Educational Diversity: Viewpoints and Proxies

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This Article considers the role of race-consciousness in promoting educational diversity. It challenges the conclusion, most famously expressed by Justice Powell's opinion in Regents of the University of California v. Bakke, *that consideration of race as one among a number of "plus" factors in admissions decisions satisfies strict scrutiny under the Equal Protection Clause. This challenge proceeds on two fronts. In the first place, the Article investigates the purpose of using proxies such as race to achieve intellectual diversity rather than a more direct attention to the viewpoints actually possessed by potential members of academic communities. In the second place, the Article questions why university admissions and hiring practices do not make a similar use of religion as a proxy for intellectual diversity. The author suggests that enthusiasm for racial, but not religious, proxies reflects a lack of enthusiasm for the kind of marketplace of ideas often championed in First Amendment cases and that this selective focus on race as a proxy for intellectual diversity neither serves a compelling interest nor is narrowly tailored to serve that interest.*

I. INTRODUCTION

Nearly twenty years ago, Justice Powell's opinion in *Regents of the University of California v. Bakke*[1] declared that the consideration of race as one factor in a state medical school's admissions process was a permissible means of achieving educational diversity.[2] Since then, race-conscious policies—both relating to admissions and to faculty hiring—have become well-established features of university life.[3] These policies track a wider current of enthusiasm for making various institutions of American public life "look like America."[4]

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[1] 438 U.S. 265 (1978).

[2] *See id.* at 320. Diversity, according to Justice Powell "may bring . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip . . . graduates to render with understanding their vital service to humanity." *Id.* at 314.

[3] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1529 (2d ed. 1988) (describing Powell's opinion as having granted a safe harbor to the Harvard-like admissions policies practiced by most American colleges and universities).

[4] *See* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 135 (1996) ("It defies logic to suggest that we can overcome America's color legacy and achieve racial justice without ensuring that . . . important

Nevertheless, diversity policies continue to generate intense public controversy and have recently experienced substantial political and judicial setbacks.[5]

For example, in the summer of 1995, the California Board of Regents ordered that preferential admissions on the basis of race be ceased at the state's institutions of higher education.[6] The Board of Regents's action, momentous in itself, was subsequently dwarfed by a more sweeping California constitutional initiative, approved by California voters in November 1996 as an amendment to the California constitution and referred to as the California Civil Rights Initiative. The Initiative, which was upheld in the face of a constitutional challenge,[7] provides that "[t]he state shall not discriminate against, or grant

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institutions 'look like America,' to use President Clinton's phrase.").

[5] *See, e.g.*, TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996); NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (Harv. Univ. Press 1987); PAUL C. ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY (1995); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986). The controversy surrounding race-conscious policies which are designed to further educational diversity is a part of the controversy surrounding affirmative action programs generally. For investigations of this wider controversy, see PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 102–03 (1993) (recounting the results of surveys concerning racial issues which emphasize white opposition to affirmative action policies). To speak of "setbacks" in affirmative action may be to put too mild of a face on the current matter. At least one opponent of affirmative action policies sees these political and judicial events as the beginning of a demise rather than mere setbacks. *See* Charles W. Collier, *The New Logic of Affirmative Action*, 45 DUKE L.J. 559, 574 (1995) ("Future historians will probably view the years 1995-96 as the period when the preferential and discriminatory practices of affirmative action began to end."). One supporter of affirmative action policies characterizes these events as "the Second Deconstruction, a period of stagnation and retrenchment following thirty years of significant gains ushered in by affirmative action." Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 194 (1997).

[6] *See* Amy Wallace & Dave Lesher, *UC Regents, in Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1. This decision, as might be expected, was subjected to intense criticism. In the summer of 1996, the American Association of University Professors issued a report criticizing the Board of Regents's decision, especially in light of the decision's possibly detrimental effects on educational diversity. *See California Regents Called Hasty on Affirmative Action*, N.Y. TIMES, June 3, 1996, at B10. For a general survey of issues regarding affirmative action in California, see DALE MAHARIDGE, THE COMING WHITE MINORITY: CALIFORNIA'S ERUPTIONS AND AMERICA'S FUTURE (1996).

[7] In *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), the Federal District Court granted a preliminary injunction against the enforcement of this provision, but the United States Court of Appeals for the Ninth Circuit thereafter reversed the preliminary injunction order after finding that there was no likelihood that the plaintiffs in the action would prevail on their equal protection and preemption claims against the state constitutional provision. *See* Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th

preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[8]

Of perhaps even greater importance are two recent appellate court decisions concerning the use of race-conscious policies to promote educational diversity. In *Hopwood v. Texas*,[9] the Fifth Circuit Court of Appeals for the Fifth Circuit declared unconstitutional the race-conscious admissions program of the University of Texas Law School. The Fifth Circuit panel determined, in route to this conclusion, that Justice Powell's *Bakke* opinion was no longer controlling authority and that the law school's asserted interest in educational diversity was not a sufficiently compelling interest to justify the race-conscious admissions program.[10] Furthermore, the court held that the University of Texas Law School lacked an adequate remedial justification for considering race in its admissions process.[11] More recently, in *Taxman v. Board of Education of the Township of Piscataway*,[12] the United States Court of Appeals for the Third Circuit held that a public school violated Title VII of the 1964 Civil Rights Act[13] when it considered race in the decision of which of two equally qualified teachers to terminate. Although recognizing that the U.S. Supreme Court has approved voluntary affirmative action programs with remedial ends in Title VII contexts, the Third Circuit determined that an interest in promoting educational diversity was not sufficient grounds for race-conscious hiring or termination decisions.[14]

There are, of course, possible justifications other than the importance of fostering diversity that are urged to support race-conscious decisionmaking in university admissions and in faculty hiring decisions. Such decisions might be justified severally as being necessary: to remedy either specifically identified, or more generally perceived, past social discrimination; to include individuals in the academic environment who have traditionally been excluded; or to distribute more equitably the social benefits and power attendant to membership

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Cir. 1997). For a general discussion of this initiative, see Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997).

[8] CAL. CONST. art. 1, § 31(a).

[9] 78 F.3d 932 (5th Cir. 1996).

[10] *See id.* at 941–48.

[11] *See id.* at 948–55. The U.S. Supreme Court subsequently declined to review the decision. *See* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

[12] 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed,* 118 S. Ct. 595 (1997).

[13] *See* 42 U.S.C. § 2000e-2(a) (1994) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin).

[14] *See id.* at 1557–63.

in an academic community.[15] Race-conscious policies may also be justified as necessary to combat continued racism, whether accomplished deliberately in contexts difficult to prove or whether engaged in unconsciously.[16] What one might characterize as a pure diversity argument contends that, without regard to questions of past or present wrongs or the requirements of remediation, race-consciousness may be justified as a way of including a diverse group of people in public institutions. The educational variant of this diversity argument suggests that race-consciousness is an appropriate aspect of attempts to enhance the diversity of viewpoints and perspectives in educational institutions.[17]

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[15] The commonly cited justifications for race-conscious preferences are the making of reparations for past discriminatory treatment, the enhancement of some aspect of social utility—such as the fostering of intellectual diversity, and the satisfaction of a notion of distributive justice. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 856 (1995); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569 (1984); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105, 112. For the view that affirmative action programs further distributive justice, see generally RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION (1992). *See also* John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER J. 49, 55 (1995). For the view that affirmative action programs serve inclusive ends, see EDLEY, *supra* note 4, at 123–41; KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 167–72 (1989).

[16] *See* ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 235–36 (1996) (suggesting the continued necessity of affirmative action programs in higher education "to provide minorities and women with a measure of protection from individual and institutional discrimination," and noting that "[f]or all the talk of diversity, professors still prefer students who look, talk, and think like them"); Collier, *supra* note 5, at 568–69 (discussing the use of affirmative action programs to offset prejudice against minorities); EDLEY, *supra* note 4, at 125 (discussing the need for programs to combat the tendency for social groups to prefer members of their own groups); Wendy Brown-Scott, *Unpacking the Affirmative Action Rhetoric*, 30 WAKE FOREST L. REV. 801, 806–07 (1995) (stating that affirmative action policies are necessary to counteract continued stereotypes of black inferiority).

[17] In support of the perspective that race-conscious decisions are appropriate for a university attempting to foster diversity, consider the following:

> Because our public universities should be places where persons from different walks of life and diverse backgrounds come together to talk with, to learn from, and to teach each other, each person's unique background and life experience may be relevant in the admissions process—thus, absolute color-blindness is not constitutionally required in the education context.

Akhil Reed Amar & Neal Kumar Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745, 1746 (1996).

The educational diversity justification has enjoyed a warm welcome among many legal scholars[18] and within the institutional practices of law schools[19] because it offers some promise of evading what some legal commentators have perceived to be disagreeable features of attempts to gear affirmative action programs toward purely compensatory, or remedial, ends. The remedial focus has been perceived as suffering at least three weaknesses. First, the remedial focus is sometimes said to encumber its beneficiaries with a stigmatic badge of inferiority.[20] Second, the remedial focus relies on a nexus with specifically

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[18] For general approval of the diversity rationale for race-conscious admissions and hiring decisions in educational institutions, see, e.g., Brest & Oshige, *supra* note 15, at 858; Charles R. Calleros, *Racial Integration of Legal Education: Making Progress and Redoubling Efforts*, NEWSLETTER, Mar. 1996, at 7 (Association of American Law Schools); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Carl C. Monk, *Reaffirming the Need for Diversity at Law Schools*, 138 NEW JERSEY L.J. 210, Sept. 12, 1994, at 14 (1994). The U. S. Department of Justice has also taken the position that the diversity rationale continues to be a viable justification for at least some race-conscious programs. *See Post*-Adarand *Guidance on Affirmative Action in Federal Employment*, [Feb. 29, 1996] 34 GOV'T EMPL. REL. REP. (Warren, Gorham & Lamont) 369 (Mar. 11, 1996).

[19] In January 1990 the House of Representatives of the American Association of Law Schools (AALS) adopted a bylaw declaring that member schools should "seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex." AALS BYLAWS, art. VI, § 6-4(c) *in* ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION HANDBOOK 22 (1990). Professor Paul D. Carrington has suggested that most law teachers support some degree of race-consciousness in academic decisions, but that those teachers oppose prescribed goals and timetables. *See* Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1106-07. In the wake of the Fifth Circuit's *Hopwood* decision, the President of the AALS reiterated the value of race-conscious policies designed to promote educational diversity in law schools. *See* Wallace D. Loh, *Diversity*, NEWSLETTER, APR. 1996, at 1 (Association of American Law Schools).

For a study suggesting that the legal academy's professed commitment to affirmative action policies has actually yielded only minor benefits for women and minorities, see Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997). *But see* Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 429-30 (1994) (suggesting that one-fifth to one-quarter of recent law school hires were minorities). For general commentary concerning the inclusion of a greater number of women and minorities in law schools, see Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

[20] *See, e.g.*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 54 (1991) (arguing that affirmative action programs produce a "racialist assumption of inferiority"). Of course, the same charge has been leveled against nonremedial justifications

identified instances of past discrimination which tend to weaken the case for remedial action as the passage of time blurs the nexus between past sin and presently perceived innocence.[21] Third, the remedial focus faces difficult problems associated with the impact of remedial programs on "innocent" bystanders.

The diversity rationale, however, seems to avoid the problem of "stigma" by redefining the "beneficiaries" of race-conscious programs.[22] The diversity rationale asserts that *all* members of the educational community, and not just the particular members admitted to promote this diversity, benefit from the diversity of its members.[23] The diversity rationale defines admissions and hiring

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for race-consciousness, including the diversity rationale. *See* Metro Broadcasting v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that race-based classifications may stigmatize groups singled out for differential treatment); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) ("Unless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1879–80 (1996) ("A conscious separation of racial diversity from every other sort of diversity implies that members of targeted minority groups are too culturally impoverished to produce talent spanning biology, history, and classics."); Foster, *supra* note 15, at 111 (asserting that the diversity rationale as generally articulated stigmatizes minority groups). For a general discussion of stigma as it relates to diversity programs, see Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361 (1997). For the suggestion that the stigma often attributed to race-conscious programs actually pre-exists these programs and is a feature of continued white racism, see, e.g., Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 542 (1990); Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1638 (1992) (reviewing STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991), and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)).

[21] *See* EDLEY, *supra* note 4, at 127. There has scarcely been a time when opponents of race-conscious acts of remediation have not suggested that the victims of past discrimination needed to simply "get over it":

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .

The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[22] *See* EDLEY, *supra* note 4, at 124–25; Rodney A. Smolla, *Affirmative Action in the Marketplace of Ideas*, 44 ARK. L. REV. 935, 935–36 (1991).

[23] *See* Amar & Katyal, *supra* note 17, at 1749; Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011, 1015 (1993). Compare the U.S. Supreme Court's similar suggestion regarding the interest in broadcast diversity used to justify the FCC

qualifications to include the possession of viewpoints or perspectives likely to enrich an educational institution's academic discourse. Advocates of the diversity rationale insist that this inclusion of diversity considerations within the definition of admissions or hiring qualifications is not inconsistent with a focus on merit. The diversity rationale simply suggests that merit may reside in other features of an individual's background besides that individual's record of academic achievement on standardized tests or in previous educational environments. The diversity rationale posits that a perspective not widely shared by other students or faculty is meritorious in an academic setting, just as speed is meritorious in a foot race and balance is meritorious in the construction of girders in tall buildings. Different practices emphasize different standards of merit, and the diversity argument seeks to broaden the standard of merit recognized within the practice of academic life.[24] Conceived in this way, the diversity rationale is comparable to existing preferences available to talented athletes or to the children of alumni.[25] In both of these cases, characteristics

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policies at issue in *Metro Broadcasting*: "The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[24] *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). The concept of merit has been the subject of intense debate among legal academics. A number of scholars have argued that either there are no objective standards available to define merit or that the concept of merit is used by members of the majority to suppress the contributions of minorities. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 103 (1991); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 951 (1991); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 8-9 (1991); D. Kennedy, *supra* note 18, at 708; Gary Pellar, *Race Consciousness*, 1990 DUKE L.J. 758, 806-07. For defenses of the concept of merit, see, e.g., Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2080-85 (1991); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1807 (1989). For the suggestion that the critique of merit is anti-Semitic and possibly racist, see Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995).

[25] *See* Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1728-29 (1995) (suggesting a variety of common deviations from the idea of intellectual merit); Sanford Levinson, Hopwood*:* *Some Reflections on Constitutional Interpretation by an Inferior Court*, 2 TEX. FORUM CIV. LIB. & CIV. R. 113, 114 (1996) (discussing affirmative action for state residents and for the children of alumni at the University of Texas Law School); Amar & Katyal, *supra* note 17, at 1749, suggest, in fact, that affirmative action programs in university admissions may have the effect of partially correcting "the racial skew of what are, quite literally, educational grandfather clauses—the admissions preferences some schools award alumni offspring."

other than intellectual achievement are brought to bear upon admissions decisions. Institutions grant preferences to athletes and to the children of alumni because these individuals bring with them characteristics advantageous to the institution. If anything, preferences based on attempts to promote intellectual diversity are more consistent with the academic missions of educational institutions than preferences for athletes and for the children of alumni.

The focus on diversity has also been used to escape the temporal nexus with the past that forms the crucial foundation for remedial uses of race-consciousness.[26] One could, of course, define the particularly valuable indicia of diversity as the experience of past discrimination and thus re-introduce this temporal nexus within the diversity context.[27] But proponents of race-conscious attempts to foster diversity seldom define the relevant part of diversity as the experience of past discrimination. Instead, they focus attention on the value of minority students in the educational process as a repository of experiences of social discrimination.

Finally, the diversity rationale for race-conscious policies seems to avoid the standard charge that affirmative action programs designed to remedy past discrimination inevitably discriminate against innocent parties who had not participated in the sins of the past and frequently benefit minorities who had not been the victims of particular past discrimination.[28] Without a focus on legally cognizable wrongs, there is no basis for invoking characterizations of victimhood or status as an "innocent" bystander.

This Article considers whether the diversity rationale as originally conceived by Justice Powell and as implemented today in educational institutions is consistent with current equal protection doctrine. Crucial to

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[26] *See* Chen, *supra* note 20, at 1846 (referring to the "morbid obsession with legal sin" that characterizes remedial approaches to affirmative action); Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986) (noting the "potentially protracted litigation over the 'factual predicate'" for remedial programs).

[27] See, for example, Sheila Foster's argument for a concept of diversity that would seek to include within various social institutions individuals who, on the basis of particular differences, have been subjected to systematic exclusion and disadvantage in society. *See* Foster, *supra* note 15, at 112.

[28] *See* Sullivan, *supra* note 26, at 92 ("[B]ecause corrective justice focuses on victims, and retributive justice on wrongdoers, predicating affirmative action on past sins of discrimination invites claims that neither nonvictims should benefit, nor nonsinners pay."). Derrick Bell discusses the ease with which these assertions are made: "It is simply too comforting for many white people to ignore the facts, to hearken to their fears, and say with real belief that blacks are demanding privileges they have not earned to remedy injustices they have not suffered." DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 73 (1987).

Justice Powell's conclusion in *Bakke* were two supporting determinations: first, that educational diversity was a compelling governmental interest because of its close association with First Amendment values, and second, that consideration of race as one factor in selecting the members of an academic community was a permissible means of achieving the desired educational diversity.[29] The first determination was flawed by failure to consider more carefully the nature of the diversity to which academic communities aspire. This Article concludes that academic devotion to the kind of intellectual exchange contemplated as a preeminent First Amendment value is not, and has never been, as "robust" as Justice Powell apparently assumed. Recognition of this fact would have yielded a less confident appraisal of the relationship between educational diversity and First Amendment values and would undermine the determination that educational diversity is a compelling governmental interest. Justice Powell's second determination lacked the close attention to means and alternatives that characterize modern applications of strict scrutiny. Close scrutiny of the means chosen to achieve educational diversity also suggests that the diversity to which academic communities aspire is not the diversity that Justice Powell envisioned. This Article concludes that neither the interests actually sought by academic communities nor the race-conscious means selected to attain these interests satisfy the rigorous scrutiny now required of all race-conscious programs.[30]

In Part II, this Article reviews the signals in recent Supreme Court opinions which suggest that Justice Powell's treatment of diversity as a compelling

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[29] For support of the status of diversity as a compelling interest, see, e.g., Laura C. Scanlan, Note, Hopwood v. Texas*: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580 (1996).

[30] Although the claimed benefits of educational diversity have been used to justify a variety of race-conscious policies, including eligibility for particular scholarships or for membership in particular student organizations, this Article will focus on admissions and hiring policies. For a discussion of the scholarship issue, see Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759 (1995); Rachel Spector, Note, *Minority Scholarships: A New Battle in the War on Affirmative Action*, 77 IOWA L. REV. 307 (1991). For cases concerning the constitutionality of minority scholarships, see Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (striking down exclusive minority scholarships). Sometimes, subsidiary programs of a university adopt race-conscious policies. For example, the law reviews at some law schools make use of race-conscious decisionmaking in their membership decisions. *See* Frederick Ramos, Note, *Affirmative Action on Law Reviews: An Empirical Study of Its Status and Effect*, 22 U. MICH. J.L. REFORM 179 (1988) (concluding that affirmative action programs are the most effective means of increasing minority membership on law reviews). For further consideration of the lack of diversity on law reviews, see Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER J. 59 (1995).

governmental interest sufficient to justify at least some forms of race-conscious decisionmaking is not likely to survive much longer. In Part III, this Article revisits Justice Powell's opinion in *Bakke* and considers whether his discussion of educational diversity as a compelling governmental interest is coherent. Here, I consider the appropriateness of using race as a proxy for intellectual diversity, especially in light of the failure to consider another important proxy: religious belief. Finally, in Part IV, this Article examines whether the use of race as a proxy for achieving educational diversity satisfies the narrow tailoring requirement of strict scrutiny.

II. THE EMERGING FACE OF AFFIRMATIVE ACTION DOCTRINE

Criticisms of the diversity rationale have generally occupied marginal positions within the legal academy, both because of widespread consensus as to the agreeableness of diversity programs and because of the apparent constitutionality of these programs after *Bakke*.[31] However, the long tenure of Justice Powell's *Bakke* opinion may soon come to an end. The U.S. Supreme Court's recent cases involving race-conscious decisionmaking have not explicitly overruled Justice Powell's opinion in *Bakke*. The Court, in fact, has not considered a case involving racial preferences in higher education since *Bakke*. Collectively, however, the opinions in the Court's recent affirmative action cases clearly cast a pall over the continued use of Justice Powell's

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[31] The chorus of support for the diversity rationale has not been uniform. In particular, some minority scholars have expressed reservations about the diversity rationale. Consider, for example, the protest voiced by Richard Delgado, a critical race scholar, to the concept of diversity:

> In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to "diversity." . . . The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students.

Delgado, *supra* note 15, at 570 n.46. Other minority scholars have expressed disapproval of the diversity formulation because it institutionalizes a focus on race rather than on merit:

> I simply do not want race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation. I do not want race-conscious decisionmaking to lose its status as a deviant mode of judging people or the work they produce. I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy.

R. Kennedy, *supra* note 24, at 1807.

diversity formulation as a justification for race-conscious decisions in admissions and hiring in colleges and universities.[32]

The U.S. Supreme Court's decision in *Bakke* signaled the beginning of a decade-long search for a doctrinal framework within which to analyze race-conscious programs intended to benefit minority groups.[33] Justice Powell's original view as to the appropriate scrutiny to be applied to benign racial preferences has now prevailed, both with respect to state and local classifications and to those made at the federal level. In *City of Richmond v. J. A. Croson Co.*, [34] a majority of the Court held that all race-conscious classifications made by state and local governments—even those which benefit minority groups—were subject to strict scrutiny. Recently, in *Adarand Constructors, Inc. v. Pena*,[35] a majority of the Court determined that federal race-conscious decisions were also subject to this exacting scrutiny, overruling, at least in part, the contrary reasoning of *Metro Broadcasting, Inc. v. FCC*, [36] which subjected a federal policy designed to benefit racial minorities in the field of broadcasting to intermediate scrutiny.[37] For race-conscious admissions or

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[32] *See* Amar & Katyal, *supra* note 17, at 1745 ("*Bakke*, it seems, now hangs by a thread.") (footnote omitted); Foster, *supra* note 15, at 109 (suggesting that the diversity justification for race-conscious decisionmaking will probably not survive in light of the current composition of the U.S. Supreme Court); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1041 (1996) (opining that diversity justifications for affirmative action are "particularly endangered" after *Adarand*); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 998–99 (1993) (arguing that the Court's more recent affirmative action precedents are inconsistent with Justice Powell's opinion in *Bakke*). *But see* Levinson, *supra* note 25, at 120–21 (relying on the idea of *stare decisis* developed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to suggest that Justices O'Connor and Kennedy may not be inclined to overrule *Bakke*).

[33] In this area of constitutional law, as in others, one's choice of classifications mirrors one's position in the larger debate. Justices who have been willing to recognize a relatively spacious constitutional harbor for racial preferences for minorities have frequently characterized these preferences as "benign" racial classifications, as distinguished from "invidious" racial classifications. *See, e.g.*, casting, Inc. v. FCC, 497 U.S. 547, 563–65 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Justices who have envisioned a far more limited constitutional haven for such preferences refuse to label them "benign." *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1993).

[34] 488 U.S. 469, 510–11 (1989) (invalidating a municipal set-aside program for minority business).

[35] 515 U.S. 200, 227 (1995) (applying strict scrutiny to a federal program designed to benefit disadvantaged businesses and employing a racial classification).

[36] 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[37] For academic praise of the *Metro Broadcasting* decision, see T. Alexander Aleinikoff,

hiring decisions to survive constitutional challenge, it is now clear that academic institutions must further a compelling governmental interest and must do so through narrowly tailored measures.[38]

Although the standard of review is clear, it is less clear what interests will be deemed sufficiently compelling and what means tailored sufficiently narrowly to satisfy strict scrutiny. The Court's recent cases have articulated only one government interest sufficiently compelling to justify race-conscious classifications: the interest in remedying the effects of specifically identified instances of racial discrimination.[39] For example, although Justice O'Connor, writing for a majority of the Court in *Adarand*, emphasized that strict scrutiny is not "strict in theory, but fatal in fact"[40] the only counterexample she offered to rebut this received wisdom was the holding of the Court in *United States v. Paradise*.[41] There, a majority of the Court upheld a hiring quota imposed by the district court to remedy discrimination against blacks in Alabama's Department of Public Safety.[42] Even the dissenters in the case—Justice O'Connor, Chief Justice Rehnquist, and Justice Scalia—agreed that the federal government had a compelling governmental interest in remedying past and present discrimination by the Department.[43] Similarly, in *Wygant v. Jackson*

A Case for Race-Consciousness, 91 COLUM. L. REV. 1060 (1991); Allen S. Hammond, IV, *Diversity and Equal Protection in the Marketplace: The* Metro Broadcasting *Case in Context*, 44 ARK. L. REV. 1063 (1991); Smolla, *supra* note 22, at 959–60; Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990). The *Metro Broadcasting* decision was criticized in Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990).

[38] *See Adarand*, 515 U.S. at 227 ("such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); *Id.* at 235 ("We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications . . . detailed examination, both as to ends and as to means."). For a general discussion of the Court's treatment of compelling interests, see Stephen E. Gottlieb, *Compelling Government Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

[39] *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (suggesting that the only recognized compelling governmental interest is the remedying of past racial discrimination). *But see* Wittmer v. Peters, 87 F.3d 916, 919–21 (7th Cir. 1996) (arguing that there may be many compelling interests). *See generally* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 359–61 (1997) (suggesting that conclusions as to which governmental interests are compelling in the equal protection context have not been rooted in the text, history, and purpose of the Fourteenth Amendment).

[40] *Adarand*, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

[41] 480 U.S. 149, 153 (1987).

[42] *See id.* at 166–86.

[43] *See id.* at 196 (O'Connor, J., dissenting). The dissenters departed from the majority

Board of Education,[44] a majority of the Court found that a layoff provision in a collective bargaining agreement between a school board and a teachers' union violated the Equal Protection Clause because it gave preferential protection against layoffs to members of certain minority groups.[45] A plurality opinion rejected the argument that the preference was justified by the state's interest in providing teacher role models for minority children. This argument, according to the plurality, had "no . . . stopping point," and because the governmental interest was not linked to any proper remedial purpose, it could be continued indefinitely.[46] Language from the Court's opinion in *Croson*[47] also suggests that a majority of the Court will only recognize interests in remedying past discrimination as sufficiently compelling to satisfy strict scrutiny.[48] Justice O'Connor, in a portion of her opinion joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy, noted that racial classifications risk inflicting stigmatic harm, and observed that unless such classifications "are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[49] Justice Scalia has denied that even remedial interests are sufficiently compelling to justify race-

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by concluding that the hiring quota was not narrowly tailored to achieve the government's compelling interest and that strict scrutiny had therefore not been satisfied. *See id.* at 196–201.

[44] 476 U.S. 267, 270–72 (1986).

[45] *See id.* at 284.

[46] *Id.* at 275 (Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.). In a separate opinion, Justice White agreed that the state's asserted interest in providing role models for minority children was not sufficient to justify the racial preference. *See id.* at 295 (White, J., concurring).

[47] 488 U.S. 469, 477–83 (1989).

[48] Charles Fried, commenting on the Court's decision in *Croson*, suggested in 1989 that "[t]he principal, perhaps the only, state interest sufficiently compelling to [satisfy strict scrutiny] is the remedying of identified acts of discrimination . . . ." Charles Fried, *Affirmative Action After* City of Richmond v. J. A. Croson Co.*: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 161 (1989).

[49] *Croson*, 488 U.S. at 493 (citations omitted). Justice O'Connor apparently revised her views on this point. In *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring), she seemed to suggest agreement with Justice Powell's finding that diversity was a compelling state interest and further hypothesized that the Court might yet acknowledge other interests sufficiently compelling to justify affirmative action programs. *See also id.* at 288 n.* (distinguishing between an interest in providing role models—which she deemed not sufficiently compelling to satisfy strict scrutiny—and an interest in fostering diversity among faculty). On the evolution of Justice O'Connor's views regarding diversity, see Kahlenberg, *supra* note 32, at 1041–42. *See also* Justin Schwartz, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence*, 58 OHIO ST. L.J., 1055 (1997).

conscious classifications.[50] On the present Court, only Justices Stevens and Ginsburg have specifically endorsed a governmental interest in educational diversity as sufficiently weighty to justify race-conscious policies.[51] In contrast with this position, Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas have each recently written or joined opinions denying that diversity constituted a compelling governmental interest.[52]

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[50] For example, Justice Scalia has stated:

> In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. . . . Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.

Adarand, 515 U.S. at 239 (Scalia, J., concurring) (citation omitted). According to Justice Scalia, the only interest sufficiently compelling to justify racial classifications of any sort would involve "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates." *See also Croson*, 488 U.S. at 520 (Scalia, J., concurring) ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.") (citations omitted); *Id.* at 521 (Scalia, J., concurring).

[51] *See Adarand*, 515 U.S. at 257 (Stevens, J., dissenting) ("Indeed, I have always believed that . . . the FCC program we upheld in [*Metro Broadcasting*] would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today."). *See also Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (suggesting that a school board could determine that "an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty"). Richard D. Kahlenberg has pointed out that two other dissenters in *Adarand*, Justices Souter and Breyer, did not use the occasion to express support for the diversity rationale for affirmative action. *See* Kahlenberg, *supra* note 32, at 1042–43.

[52] *See Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.):

> Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

One might argue that the dissenters in *Metro Broadcasting* opposed the use of race as a proxy for promoting broadcast diversity but did not necessarily oppose the use of race to promote educational diversity. Justice O'Connor reasoned in a fashion, however, that seemed to call into question *any* use of race as a proxy for viewpoint: "The Constitution provides that the Government may not allocate benefits and burdens among individuals based on the

Although the U.S. Supreme Court had previously upheld a racial preference designed to benefit certain minorities in *Metro Broadcasting*[53] as substantially related to the government's important interest in broadcast diversity, a majority of the Court in *Adarand* overruled a key aspect of the holding in *Metro Broadcasting*.[54] In *Metro Broadcasting*, a majority of the Court upheld two FCC policies that granted preferential treatment to certain minorities.[55] Crucial to this holding was the majority's determination that congressionally mandated racial preferences intended to compensate victims of past discrimination were permissible so long as they served "important governmental objections within the power of Congress and [were] substantially related to achievement of those objectives."[56] The Court accordingly determined that the promotion of broadcast diversity was, "at the very least," an important governmental interest.[57] Now that *Adarand* has made this determination irrelevant, by insisting on a higher level of scrutiny for race-

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assumption that race or ethnicity determines how they act or think." *Id.* at 602. Recently, Justice Thomas, who joined the Court after *Metro Broadcasting*, has also argued that diversity is not a compelling governmental interest. *See Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part). Although in *Wygant* Justice O'Connor referred to the fact that a "state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest," 476 U.S. at 286 (O'Connor, J., concurring in part), it is now clear that this passage should be understood as Justice O'Connor's description of existing understandings of affirmative action doctrine rather than as her own judgment concerning the appropriateness of these understandings.

[53] *Metro Broadcasting*, 497 U.S. at 600.

[54] *See Adarand*, 515 U.S. at 227.

[55] The FCC construed minorities to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *Metro Broadcasting*, 497 U.S. at 555 n.1 (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978)). The first policy at issue was one according to which the FCC determined that minority ownership and participation in the management of a broadcast facility would be considered as a "plus" in comparative proceedings for a new broadcast license. *Id.* at 557. The second policy consisted of a minority "distress sale" policy, which facilitated the transfer of existing broadcast stations to minority-owned companies. *Id.* at 552, 557–58.

[56] *Id.* at 565.

[57] *Id.* at 567. The Court's decision in *United States v. Virginia*, 116 S. Ct. 2264, 2276-77 (1996), appears to contemplate the possibility that educational diversity might justify the kind of gender discrimination necessary to support the existence of single-sex schools in some circumstances but denies that diversity was the real aim of the program in that case. Again, though, this countenancing of diversity occurred under the auspices of intermediate level scrutiny. *See id.* at 2275–76.

conscious programs,[58] there is little reason to believe that the *Metro Broadcasting* decision will offer a safe harbor to the diversity rationale in the increasingly rough weather that race-conscious programs seem to face.

There are, of course, substantial objections one might make to the Court's use of strict scrutiny to evaluate the constitutionality of race-conscious decisions benefiting minorities. In view of the typically fatal effect such review has on racial classifications, the affirmative action debate has focused much attention on this doctrinal issue. This Article is not intended to review the Court's determination on this point. Instead, it re-evaluates Justice Powell's conclusion in *Bakke* that the consideration of race as a "plus" factor in university admissions can survive strict scrutiny under equal protection analysis.

III. THE *BAKKE* OPINION

The general contours of Justice Powell's opinion in *Bakke* are familiar and need not be greatly elaborated upon.[59] Justice Powell determined that race-conscious admissions decisions at a public institution must satisfy strict scrutiny—that is, be precisely tailored to serve a compelling governmental interest.[60] He then rejected as sufficiently compelling several interests allegedly served by the race-conscious admissions program in effect at the medical school of the University of California at Davis. Justice Powell dismissed out-of-hand the contention that the state had any legitimate interest in simply assuring that the medical school's student body had specified percentages of particular racial or ethnic groups.[61] He also denied that the state institution had a compelling interest in assisting certain groups believed to be the object of "social discrimination."[62] Furthermore, he rejected the state's asserted interest in delivering health-care services to under-served communities as adequate justification for its admissions policies, arguing that the state had not demonstrated how preferential admissions policies for minority groups actually furthered its asserted interest.[63]

Justice Powell, though, agreed with the state that it had an interest in

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[58] *See Adarand*, 515 U.S. at 227 (requiring strict scrutiny for racial classifications).

[59] For the historical background of the *Bakke* opinion, see BERNARD SCHWARTZ, BEHIND *BAKKE*: AFFIRMATIVE ACTION AND THE SUPREME COURT (1988). *See also* Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967–1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473, 512–31 (1995) (discussing Justice Powell's affirmative action analysis in *Bakke*).

[60] *See Bakke*, 438 U.S. at 299.

[61] *See id.* at 307.

[62] *Id.* at 310.

[63] *See id.*

securing a diverse student body. This, he said, "clearly is a constitutionally permissible goal for an institution of higher [learning]."[64] Of course, with the Justice's invocation of strict scrutiny as the appropriate standard of review, merely "permissible" or "legitimate" goals became insufficient to sustain the state's race-conscious program. In fact, Justice Powell ultimately denominated the interest in diversity as a compelling one,[65] but his intellectual route to this determination was not altogether clear.

Justice Powell observed that the interest in selecting a diverse array of students implicated the principle of academic freedom, noting that this freedom, though not specifically enumerated in the U.S. Constitution, was nevertheless a "special concern" of the First Amendment.[66] Academic freedom, as Justice Frankfurter observed in his concurring opinion in *Sweezy v. New Hampshire*,[67] includes among its constitutive elements the freedom of an academic institution to choose its students.[68] Freedom to choose students numbered among the "four essential freedoms" of a university, which included: "[Freedom] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[69] But this freedom to choose students did not in-and-of-itself constitute the requisite compelling interest sufficient to justify the state's preferential admissions program in *Bakke*. Justice Powell would ultimately deny that the University of California could shield its use of racial quotas in admissions under the mantle of academic freedom. This was because the academic freedom that Justice Powell recognized as having compelling weight was an instrumental freedom rather than a right of autonomous decisionmaking, an instrumental freedom in service of a more fundamental First Amendment interest: the interest in promoting a "robust exchange of ideas."[70]

In harnessing academic freedom to this instrumental end, Justice Powell was on solid precedential footing. The Court had previously emphasized the relationship between academic freedom and the marketplace of ideas in

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[64] *Id.* at 311–12.

[65] *See id.* at 314–15 ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.").

[66] *Id.* at 312.

[67] 354 U.S. 234 (1957).

[68] *Id.* at 263 (Frankfurter, J., concurring).

[69] *Id.* (quoting conference of REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10 (1957) [hereinafter CONFERENCE]).

[70] *Bakke*, 438 U.S. at 313.

Keyishian v. Board of Regents:[71]

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.... The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[72]

Justice Frankfurter had also celebrated the "four essential freedoms" of the academy within the context of the more fundamental value of free speech. The four freedoms flourished in the atmosphere where creation was the central business of the university: "the atmosphere which is most conducive to speculation, experiment and creation."[73] Thus, Justice Powell recognized as a compelling interest not simply a university's abstract interest in selecting students, but the more focused interest in selecting "those students who will contribute the most to the 'robust exchange of ideas.'"[74] He recognized that students with particular backgrounds "may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student

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[71] 385 U.S. 589 (1967) (upholding the rights of faculty members to refuse to certify to the administrators of the university that they were not communists).

[72] *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). In the previous decade the Court acknowledged the benefits of a racially diverse student body in *Sweatt v. Painter*, 339 U.S. 629 (1950). There, the Court denied that a black student consigned to a recently established black law school would receive the educational equivalent of a law degree from the University of Texas Law School. *See id.* at 635–36. The Court stated that few students and no one who has practiced law would choose to study in an academic vacuum, which is removed from the interplay of ideas and the exchange of views with which the law is concerned:

> The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

Id. at 634.

[73] *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

[74] *Bakke*, 438 U.S. at 313. As Rodney Smolla observed, "classic First Amendment theory always pledged allegiance to the value of diversity, [but] this diversity was to arise spontaneously, of its own devices, from an unregulated market." Smolla, *supra* note 22, at 958–59.

body and better equip its graduates to render with understanding their vital service to humanity."[75] But Justice Powell ultimately denied that racial or ethnic backgrounds could be given automatically determinative effect in securing the intended "robust" assortment of students. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further the attainment of genuine diversity."[76] Consequently, Justice Powell concluded that racial or ethnic background might appropriately be considered as one factor in an admissions process, but that it could not be made determinative of outcomes within that process.[77]

A. *Viewpoints, Perspectives, and Proxies*

There is a curious omission in Justice Powell's vision of diversity. Justice Powell rooted the compelling weight assigned to educational diversity in the First Amendment value of a robust exchange of ideas. Yet, when Justice Powell enumerated the personal characteristics that might "promote beneficial educational pluralism,"[78] his list was altogether devoid of any explicit reference to intellectual viewpoints. Characteristics relevant to educational pluralism might include, according to the Justice, "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."[79] If *intellectual* pluralism is a state interest sufficiently compelling to justify a racial classification, then the characteristics that Justice Powell cites as possibly relevant to the achievement of this pluralism seem at best weak proxies for more immediately relevant characteristics, such as the viewpoints held by students on matters likely to be addressed in the academic environment.[80]

To accept this viewpoint, one need not hold that reliance on race as a proxy for viewpoints or perspectives is irrational.[81] Assertions that consideration of

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[75] *Bakke*, 438 U.S. at 314.

[76] *Id.* at 315.

[77] *See id.* at 317–18.

[78] *Id.* at 317.

[79] *Id.*

[80] *See* Brest & Oshige, *supra* note 15, at 863 ("Ultimately, what matters to an institution's intellectual mission is not group membership or background as such, but a multiplicity of intellectual perspectives.").

[81] On the relevance of race to viewpoint and perspective, see, e.g., EDLEY, *supra* note

race as one factor in attempting to foster intellectual diversity is irrational amount to nothing more than loose talk.[82] For example, the Fifth Circuit in *Hopwood v. Texas* suggested that consideration of race as a factor in selecting a diverse student body is "no more rational on its terms than would be choices based upon the physical size or blood type of applicants."[83] But having type A blood in the United States does not carry the same cultural freight as, for example, being black does. In this country, race has been made relevant—wrongly so—in a myriad of ways that blood type has not. To ignore these patterns of meanings is simply to ignore social reality.[84]

Suppose, through some bizarre and irrational set of circumstances, that blood type was made a basis for social hierarchy and for the distribution of social advantages and disadvantages in a society. For generations, individuals with a particular blood type—type O, let us suppose—were subordinated by the force of law and social practice, until finally, the society realized its previous

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4, at 136–37; Aleinikoff, *supra* note 37, at 1092–95 (describing as "implausible" the idea that the meaning of race is the same for members of different races); Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22 (1991); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1247–50 (1993) (arguing that discrimination suffered by Asian Americans is different than that suffered by other groups, and that this has "certain implications for the study of Asian-Americans and the law"); Delgado, *supra* note 15, at 567 (pointing out reasons why scholarship dealing with the rights of a group should include the scholarship by members of that group); Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1366–67 (1996) (describing the influence of race on experience). *But see* CARTER, *supra* note 20, at 32-36 (1991) (expressing criticism of the essentialist view of race); R. Kennedy, *supra* note 24, at 1802–03 (challenging the use of race as an intellectual credential).

[82] *See* Delgado, *supra* note 23. In particular, Delgado asserts that:

> A moment's reflection enables us to take notice that most law-and-economics scholars are conservative Republicans; that most radical feminists are women, not men; and that most Critical Race Theory exponents are men and women of color. Law schools are not required to ignore what everyone knows, namely that color, gender, and life experience sometimes matter.

Id. at 1016.

[83] 78 F.3d 932, 945 (5th Cir. 1996).

[84] For the suggestion that racial discrimination may be rational in some contexts, see David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 108–10 (giving examples of efficient discrimination); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 755–56 (1991) (describing possible scenarios in which discrimination might be viewed as economically rational); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) ("[I]n our present society, race is not always irrelevant to sound governmental decisionmaking.").

wrong and determined that blood type could no longer be used as a basis for classifying citizens. Now, perhaps that society might determine that the risk of improper use of the blood type classification warranted a bar on any use of blood type, even rational uses. There might be grounds for this determination. But to say this is not also to say that the society could, by this decision, immediately change the social meanings that had been attached to blood type and the varying perspectives that would have arisen out of these meanings.

It probably would not be rational to assume that individuals with the formerly disfavored blood type could be expected to hold certain views in common (other than the conviction that the blood type disfavoring was wrong). Some type O's would hold generally liberal viewpoints, some would hold conservative ones. Many type O's might favor official actions to affirmatively undo certain social constructions and patterns made on the basis of the now discredited classification, even if doing so required taking blood type into account so as to benefit type O's. Others, though fewer perhaps, might hold that only blood type-blindness would carry the country beyond its previous wrongful use of blood type as a classifying device. Whether liberal or conservative, though, type O's reached their respective political orientations through the experience of being type O's in a society in which blood type mattered in the past and still matters in numerous ways, despite official efforts to repudiate the past discrimination. Suppose academic institutions still wrestle with questions based on blood type classifications, for example, whether the classification should be permitted under any circumstances, whether its victims should be compensated in some respect, and the nature of social contributions that cultures which grew up around membership in the formerly disfavored class of type O's have produced.[85] Is it *irrational* to believe that discussions on these issues might be benefited by the presence of some type O's, not because any particular type O can be expected to advocate a specific viewpoint, but because type O's and the social predicaments that have arisen out of their

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[85] *See* Williams, *supra* note 37, at 529:

> For example, the literal biological truth that blacks (or members of any other racial or ethnic groups) are not born with genetic inclination for "things black" is often used to obscure the fact that "black" (like most racial or ethnic classification) also defines a culture. Blackness as culture (perhaps more easily understood as such in the designation "African-American") usually evokes a shared heritage of language patterns, habits, history, and experience.

Id. See also Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 336 (1995) (suggesting that race actually represents culture in the context of diversity policies).

treatment are the very subject of important academic discussions?[86] Furthermore, might it not be reasonable to take deliberate steps to see that type O's would be represented in academic settings *precisely* as a way of rebutting crude essentialisms which posit that all type O's think or behave in certain ways?[87] Therefore, even if it may not be prudent to take into account whether a particular applicant for admission to an academic institution is a type O, even if it is for some reason an immoral consideration, it can hardly be said to be irrational. To discussions about type O's and society's treatment of them, type O's bring a unique perspective, whether they are conservative or liberal—the perspective of being a type O in a society where blood type has mattered and continues to matter.[88]

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[86] Professor Sanford Levinson heralds the benefits of a diverse classroom and criticizes the Fifth Circuit for failing to recognize that importance in *Hopwood*:

> [T]he fact that legal education in my own experience is far better if the classrooms are made up of diverse rather than racially or ethnically (or, for that matter, regionally) homogeneous student bodies. As someone who regularly teaches courses involving the great issues of American society, I can testify to the importance of such diverse classes in generating acute, even if at times uncomfortable, discussions. The interpretive confidence of the Fifth Circuit panel is matched only by its consummate ignorance of the way that law schools actually work.

Levinson, *supra* note 25, at 116.

[87] On the dangers of racial essentialism, see RUTH COLKER, HYBRID: BISEXUALS, MUTLIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 138 (1996); Paulsen, *supra* note 32, at 1000 ("People are not intellectual captives of their skin color."). Even if race were not a reasonable proxy for the viewpoints and perspectives of students, race-consciousness in important public institutions—such as educational institutions—may yet be rational in a society still gripped by this kind of consciousness:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting). Justice Stevens finds a use for race-consciousness in a policy designed to subvert race-consciousness. By explicitly seeking to include racial minorities, government—according to Justice Stevens—seeks to display openly the irrelevance of race in a democratic society. *See id. at* 320.

[88] Discussing the importance of race to social and personal identity, Wasserstrom

My argument, then, is not that using race as a proxy for viewpoint and perspective is unreasonable, but that the failure to investigate viewpoints and perspectives themselves in some more direct fashion is curious if academic institutions in fact seek to establish a diverse exchange of ideas. This curiosity would almost certainly not be sufficient grounds for invalidating race-conscious programs under the lowest tier of equal protection scrutiny. But it does pose problems for race-conscious programs subjected—as they now must be—to strict scrutiny.[89]

Why would academic institutions interested in creating a diverse exchange of ideas emphasize their commitment to considering a variety of proxies, such as race and socioeconomic background, rather than the actual viewpoints and ideas held by would-be members of these institutions? Conceivably, one might respond that various administrative difficulties would attend an attempt to select students and faculty, even partially, on the basis of the viewpoints they actually held. Suppose, for example, potential students or faculty were asked to fill out questionnaires or to write essays designed to elicit their perspectives on a variety of issues.[90] How would academic institutions prevent misrepresentations in these situations? Of course, the problem of misrepresentation can arise even if universities rely on other proxies for viewpoints instead of trying to ascertain

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concluded that:

> One complex but true empirical fact about our society is that the race of an individual is much more than a fact of superficial physiology. It is, instead, one of the dominant characteristics that affects both the way the individual looks at the world and the way the world looks at the individual.

Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586 (1977). Of course, there may be academic settings in which the subject of blood type does not arise often. For at least some type O's, this kind of setting would be extraordinarily rare, because, they would argue, the meanings once ascribed to blood type have influenced virtually every field of thought. But if there were settings in which this argument was not plausible, then using blood type as a proxy for educational diversity might be irrational.

[89] *Cf.* Roberts v. United States Jaycees, 468 U.S. 609, 627–28 (1984) (finding impermissible the judicial assumption that women and minorities have "a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations" even if such generalizations have "a statistical basis in fact with respect to particular positions").

[90] The use of personal data in a narrative form to assist administrative or hiring decisions is, of course, nothing unusual. For a proposal that greater reliance be made upon personal statements than upon the mere fact of racial self-identification to determine the appropriate beneficiaries of affirmative action programs, see Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 978–81 (1995) (describing a hypothetical admissions plan).

viewpoints more directly.[91] Some of these proxies are, perhaps, readily verifiable and the fact that they are readily verifiable discourages misrepresentations. But other proxies sometimes used in admissions—social disadvantage, for example—may not be so readily verified, and thus may also be subject to the risk of misrepresentation. Furthermore, even if a direct inquiry into the viewpoints of students and faculty might entail some administrative difficulties, one would expect that an application of strict scrutiny to the use of race as a proxy would require some concrete showing of these difficulties; and that the interest in avoiding administrative difficulties would fail, in any event, to satisfy heightened scrutiny.[92]

Finally, whatever difficulties might attend a direct inquiry into the viewpoints and perspectives held by student applicants to a university, it is much harder to imagine the same kind of difficulties in the case of faculty hiring. If academic communities in fact desire to marshal an assortment of viewpoints to provoke a "robust exchange of ideas," it is hard to see why they need proxies such as race to do so. Scholars generally leave plenty of viewpoint tracks in their wake: the contents of dissertations and publications, for example. If an academic institution has need of a particular perspective to enrich its debate, what prevents the institution from simply identifying candidates through publications or presentations known to have the particular perspective sought?[93] The use of race or even gender as a proxy for a particular sought-after perspective, while not unreasonable per se, is nevertheless a crude selection device, calculated to satisfy neither the asserted needs of an institution nor of a scholar.[94]

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[91] For a discussion of possible misrepresentations concerning the proxy of race, see Karst, *supra* note 85, at 337 (suggesting that false self-identifications of race are not a major problem and need not require institutions to make an independent investigation of an application's race in every case).

[92] *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 508 (1989) ("[T]he interest in avoiding . . . bureaucratic effort cannot justify a rigid line drawn on the basis of a suspect classification."); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding that statutes drawing lines between the sexes solely for administrative convenience violate the Due Process Clause). *See generally* Leslie W. Abramson, *Equal Protection and Administrative Convenience*, 52 TENN. L. REV. 1, 13 (1984) (asserting that administrative convenience is not a compelling governmental interest under strict scrutiny).

[93] *See* Paulsen, *supra* note 32, at 1002 ("One can test directly for diversity of opinion by asking someone about his or her views or thoughts on a particular issue.").

[94] For a discussion of the disadvantage to some women and minorities of being included in academic settings for reasons of diversity, see Donna E. Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 11 BERKELEY WOMEN'S L.J. 270 (1995):

B. *Academic Freedom and the Marketplace of Ideas*

It is reasonable, at this point, to wonder whether universities in fact seek to organize themselves as Holmesian marketplaces of ideas. The answer is that universities do not, at least not in a sense familiar to traditional free speech analysis. The academic freedom recognized by Justice Powell in *Bakke* was not really a freedom in which the university was vitally interested. Justice Powell's academic freedom was an instrumental one, which permitted a university to pursue a certain kind of institutional life. The academic freedom sought by the university, though, was in the nature of a right of autonomy that would have permitted it to pursue its own, different, kind of institutional life. Here lies the tension: the form of institutional life envisioned by Justice Powell was not the life envisioned by the academic institution.

These variant understandings of academic freedom did not make their first appearance in *Bakke*. These understandings reflected, rather, an already established tension between an older but still resonant academic vision and a judicial vision influenced by the Supreme Court's First Amendment jurisprudence.[95] The academic vision—most importantly memorialized in the American Association of University Professors' (AAUP) 1915 Declaration[96]—is at odds with the pluralistic vision that has most influenced the Court's First Amendment cases. The 1915 Declaration's vision of academic freedom is rooted in the concept of scientific autonomy rather than intellectual pluralism.[97]

> However, what is troubling is the tendency of diversity advocates to concentrate on institutional or professional interests from the perspective of the majority, such as providing a resource for majority faculty to learn about race and gender issues. These interests often conflict with the professional interests of women and people of color who enter the academy as the actual or perceived beneficiaries of affirmative action. The institutional interest in having a resource for the majority faculty conflicts with a woman of color law professor's interest in being seen as a competent professional in her areas of expertise, not only in the areas of race and gender. Such conflicts may contribute to the relatively high rate at which people of color and women leave legal academia.

Id. at 274 (footnote omitted).

[95] *See generally* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) (describing the history, emergence, and transformations of academic freedom).

[96] American Association of University Professors, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 17 (1915), *reprinted in* 53 LAW & CONTEMP. PROBS., Summer 1990, at 393.

[97] The AAUP report describes "progress in scientific knowledge" as "essential to civilization." *Id.* at 396.

The 1915 Declaration champions the freedom of specialists, pursuing scientific methodologies, to be free from lay interference.[98] Implicit in this view of academic freedom was a categorization of ideas into those derived through application of scientific methods of investigation and those that were the product of mere popular prejudice.[99] The university contemplated by the 1915 Declaration was anything but a true "marketplace of ideas," because established canons of scientific inquiry were expected to liberate academics in the search for truth from baser ideas tinged with prejudice.[100] If the university could be envisioned as a marketplace at all, it was one in which the regulators made sure that inferior ideas were excluded out-of-hand.

Early references to the concept of academic freedom by Justices of the Supreme Court tended to emphasize the values of academic autonomy and the value of an unfettered academic inquiry in a spirit comfortable with the 1915 Declaration.[101] A dissenting opinion by Justice Douglas, frequently noted as containing the first reference to "academic freedom" by a Justice of the Supreme Court, links academic freedom to free inquiry. *Adler v. Board of*

> [T]he proper fulfillment of the work of the professorate requires that our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside of their ranks.

Id.; *see also id.* at 396–97 (stating that the teaching profession is corrupted when influenced by any motive other than the "scientific conscience" of the professorate); *id.* at 401 ("The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it, is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim.").

[98] *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 273–79 (1989) (describing the culture surrounding the drafting of the AAUP's 1915 Declaration).

[99] *See id.* at 273 (describing this view of scholarship as "a form of elite speech that demanded protection from popular prejudices"); J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 317–18 (1993).

[100] Justice Holmes first articulated the marketplace metaphor in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), observing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630 (Holmes, J., dissenting). For a general discussion and critique of the metaphor, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

[101] For a general overview of the development of a constitutional principle of academic freedom, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 79.

Education[102] involved a challenge to a New York law which disqualified individuals from holding public positions of employment who were found to have associated with any groups espousing the violent overthrow of the United States government. A majority of the Court rejected the challenge on the now-discredited grounds that public employment was a privilege—rather than a right—to which government might attach such conditions as it deemed appropriate.[103] Justice Douglas dissented from this holding and rejected the right/privilege distinction and argued that the law in question—as applied to public teachers—limited academic freedom:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry.[104]

This early conception of academic freedom resonates with a concern for autonomy consistent with the AAUP's 1915 Declaration. Similarly, in two concurring opinions important to academic freedom authored by Justice Frankfurter in the 1950s, the Justice defended academic freedom in terms of its securing a right of autonomous inquiry by academics. For example, in *Wieman v. Updegraff*,[105] Justice Frankfurter concurred in the Court's decision holding unconstitutional a statute requiring a disclaimer oath as a condition of public service, as applied to college professors, and observed that such a statute "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice."[106] Frankfurter forged the same alliance between academic freedom and intellectual autonomy in his concurring opinion in *Sweezy v. New Hampshire*,[107] where he described a university as characterized "by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.'"[108]

Ultimately, however, a new rhetoric appeared in the Court's occasional

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[102] 342 U.S. 485 (1952).

[103] *See id.* at 492.

[104] *Id.* at 510 (Douglas, J., dissenting).

[105] 344 U.S. 183 (1952).

[106] *Id.* at 195 (Frankfurter, J., concurring).

[107] 354 U.S. 234 (1957).

[108] *Id.* at 262 (1957) (Frankfurter, J., concurring) (quoting CONFERENCE, *supra* note 69, at 10).

references to academic freedom—a rhetoric focused not on autonomy but on pluralism. Metaphors of debate and multiplicity of perspectives eventually supplanted "free spirit" justifications for academic freedom. This new rhetoric surfaced first in Justice Brennan's opinion for the Court in *Keyishian v. Board of Regents*,[109] where the image of the scientist, unmolested in the creative isolation of the laboratory, was supplanted by the noisier and more peopled image of the marketplace:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[110]

Justice Powell's opinion in *Bakke*, relying heavily on the rhetoric of *Keyishian*, returned to the same image of academic freedom: an image of debate fostered by the existence of intellectual pluralism. The Nation's future, he reiterated in *Keyishian*, "'depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[111] Thus, he argued, the State of California, in urging that its universities be accorded "the right to select those students who will contribute the most to the 'robust exchange of ideas,'"[112] had invoked "a countervailing constitutional interest, that of the First Amendment."[113]

One familiar with the idea of academic freedom enshrined in the 1915 Declaration reads this portion of Justice Powell's opinion with great puzzlement. Had universities so altered their identities from 1915 to 1978 that the image of the marketplace now supplanted the image of the secluded research laboratory as defining the essence of the academic enterprise? If not, then Justice Powell was asserting constitutional stature for a right that the university had little interest in exercising, and had merely confused the

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[109] 385 U.S. 589 (1967).

[110] *Id.* at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960), and United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (citations omitted).

[111] University of Cal. Regents v. Bakke, 438 U.S. 265, 313 (1978) (quoting Keyishian, 385 U.S. at 603).

[112] *Id.*

[113] *Id.*

underlying issue of whether the state had a compelling interest in the race-conscious program at issue. If the state's real interest was not in assembling a robust debate, then the appeal to the First Amendment as a way of measuring the weightiness of that interest was inappropriate.

In fact, the academics who penned the 1915 Declaration would probably have been appalled at the notion of admitting students partially on the basis of their race, or of any of a host of other personal characteristics unrelated to their likely suitability as acolytes in the temple of scientific inquiry. Viewpoints shaped by the personal experience of race would appear to constitute one of the kinds of popular prejudice from which the AAUP sought to secure the modern university. "Diversity," in fact, was anything but the aim of the 1915 Declaration. This Declaration championed the autonomy of scientific merit rather than the rich multiplicity of human viewpoint and experience. It viewed most of these viewpoints as threats to the scientific culture of the academy. Thus, that universities in the 1970s were anxious to welcome viewpoints that they would earlier have shunned undoubtedly reflects some change in institutional self-definition. Had universities, though, embraced the idea of the marketplace of ideas as the fitting metaphor for their academic enterprises or was their devotion to racial and ethnic diversity geared to serve other purposes?

Conservative observers especially would deny that universities are true marketplaces of ideas and would insist that universities have been captured instead by political ideologies of the left, which routinely censor views of which they disapprove.[114] But one need not assent to this controversial characterization to recognize that academic institutions do not in fact aspire to be the kind of free forum of ideas traditionally championed in First Amendment cases. The university of the late twentieth century is more inclined to see positive value in the rich particularity of experiences and perspectives from a diverse community of students and faculty than the university of the early twentieth century. Nevertheless, it still seeks to channel these experiences and perspectives into a particular community of discourse that values some ideas and forms of argument more than others.[115] In the name of the search for truth,

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[114] *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991).

[115] Speaking of academic hiring, Professor Levinson suggests that particular disciplines within an academic community "will decide whose conversations it finds interesting, helpful, or illuminating. Those people will be hired, and none others." SANFORD LEVINSON, CONSTITUTIONAL FAITH 178 (1988). *See also* Widmar v. Vincent, 454 U.S. 263, 278–79 (1981) (Stevens, J., concurring):

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their

universities unabashedly attempt to suppress certain forms of discourse and to nurture others. It is in the very nature of the academic enterprise to distinguish between ideas worthy of investigation and discussion and those ideas deemed beyond the pale, forms of discourse appropriate to the life of the mind and forms relegated to the intellectually barren wilderness of talk radio. Universities seek to celebrate the scholar and to silence the fool. They encourage critical rather than reflexive thinking and the elaboration of careful arguments rather than the mere assertion of fixed opinion. Universities may endow chairs for the astronomy, but not for the study of UFOs shortly expected to deliver a chosen few of Earth's inhabitants to a higher plane of existence.

Law schools, for example, typically share a set of common ideological commitments. J. Peter Byrne describes these ideologies as shared beliefs that "the legal profession and the institutions it dominates ought to serve 'the public interest,' that existing laws should be improved, and that individual lawyers ought to be competent and ethical."[116] A legal scholar who opposed these ideas, Byrne suggests, that a lawyer who

> did in fact argue that the only valid purpose of the legal system was to make lawyers rich, that questioning the perfection of existing laws was blasphemous, or that lawyers should bribe officials whenever it serves their clients' interest . . . would be treated like a biologist who asserted that moonbeams give birth to living organisms.[117]

To make this observation is only to note that the life of law schools, and of universities generally, can hardly be reduced to the uncomplicated role of First Amendment midwife. Academic institutions serve manifold aims, and these aims frequently call upon such institutions to regulate and to restrict the free flow of ideas celebrated by the marketplace metaphor.

The failure of universities to pay close attention to the actual viewpoints of would-be students, then, is not a mere capitulation to administrative convenience. It is true, as a general matter, that the universities value *some* diversity of opinion, experience, background, and perspective among their students. Universities view a diversity of these characteristics as important in enlivening the highly structured and regulated community of speech to which they aspire. In some ways, the universities value this kind of multiplicity of

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> academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written.

Id. at 278.

[116] Byrne, *supra* note 99, at 330.

[117] *Id.*

experience and background not so much for the diverse viewpoints to which they contribute, but because these experiences and backgrounds themselves become data in the academic discourse. Universities, though, are not really interested in replicating the full range of ideas of viewpoints available within the broader society in which the universities find themselves. There is nothing nefarious in this lack of enthusiasm for every conceivable viewpoint and perspective. In fact, it is difficult to imagine an academic institution that did not practice the form of intellectual discrimination that most universities do in fact practice.[118] Strangely, however, it is not easy to place the intellectual selectivity of universities on the mantle of the First Amendment.[119]

What the University of California sought in *Bakke* had more in common with the older view of academic freedom—a view emphasizing autonomy—than with the Supreme Court's more recent view of academic freedom—emphasizing robust debate. The University attempted to gain the right for experts to determine autonomously the kind of educational environment to which it aspired. On this point, however, the University suffered clear defeat. It could not cloak race consciousness beneath an incantation of the values of autonomy and of the deference owed to educational expertise. Instead, Justice Powell granted the University freedom only to create an environment characterized by a robust exchange of ideas. But, as I have suggested, this was not a freedom that universities were or are now inclined to assert rigorously. To do so would be to change the intellectual environment that universities were endeavoring to sustain. Therefore, the appropriate inquiry was not whether

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[118] Robert Post characterizes the university's mission as that of providing "critical education," which he elaborates as requiring "not only an unfettered freedom of ideas, but also honesty, fidelity to reason, and respect for method and procedures." Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 324 (1991).

[119] Some of the content discrimination of speech in which public universities engage may be classed as a structuring of government's own speech rather than as a regulation of private speech. In these situations universities have more latitude under the First Amendment to govern speech in ways that further their legitimate missions.

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823 (1995). On the special First Amendment issues raised by government speech, see generally MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

universities have a compelling interest in assembling a diverse array of students and faculty to produce a robust exchange of ideas. The appropriate inquiry was, rather, whether universities have a compelling interest in enhancing the diversity of the participants in an academic discourse that deliberately seeks to suppress particular ideas and forms of argument and to foster other ideas and arguments. This, I suggest, is a more difficult question than the one that Justice Powell's opinion in *Bakke* purported to resolve.

C. Managing the Marketplace of Ideas

Implicit in Justice Powell's understanding of educational diversity was the recognition that government may *manage* the marketplace of ideas as exhibited in a university setting. At least two kinds of management are plausible in this setting. First, a university might seek to manage the ideas expressed in its academic community in ways calculated to maximize the variety of intellectual wares exhibited there. Second, a university might seek—in fact, as I argued in the last section, *does* seek—to manage ideas in a way that sustains the particular kind of discourse that it seeks to create. The first kind of management seeks to maximize the variety of speech; the second seeks to maximize the quality of speech. These two kinds of management are in obvious tension with one another. An actual attempt to maximize all possible viewpoints within the university would jeopardize its program of championing particular kinds of viewpoints. But, the university does, in fact, try to have it both ways: it seeks a diversity of perspective and experience among its students and faculty, while at the same time it seeks to champion the intellectual norms of its various disciplines.

The U.S. Supreme Court has never precisely addressed either kind of management in the academic context. Guided by the marketplace metaphor, the Court has tended to assume that First Amendment values are best served by preventing government-sponsored suppression of particular voices, and thus assuring the ability of differing voices to be heard by. Both forms of marketplace management that I have described, however, constitute content discrimination of speech and, in some cases, viewpoint discrimination. These kinds of discrimination are traditionally disfavored in First Amendment law.[120]

The U.S. Supreme Court has never squarely blessed diversity management

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[120] Generally, public institutions may not base employment decisions on political affiliations or viewpoints of candidates. *See* Rutan v. Republican Party, 497 U.S. 62, 71 (1990) (stating that conditioning employment on an employee's political views is violative of the First Amendment); *see generally* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that the government may not deny a benefit to a person on a basis that infringes his interest in freedom of speech).

in the academic context, though it has permitted regulations of speech designed to maximize variety in broadcast settings.[121] It remains an open question whether a university could exercise viewpoint discrimination in the hiring of faculty, not for the purpose of suppressing unpopular ideas, but for the purpose of promoting a balanced and diverse assemblage of views among its faculty.[122] Moreover, it is not even settled whether a public librarian may consider the viewpoints expressed in books in order to assemble a balanced collection of reading materials. Though there is at least some basis for believing that this kind of management is constitutional.[123] The second form of management, intended to fashion a particular form of discourse, raises similarly unsettled issues. Certainly, the routine practices of academic institutions, including public institutions, involve this kind of management. Moreover, it is hard to imagine an academic institution that did not attempt to manage discourse in this way. At the most basic level, instructors critique the discourse of students, and

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[121] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding the Federal Communication Commission's "fairness doctrine," which required broadcasters to provide an opportunity for the expression of contrasting viewpoints); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 596 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (upholding FCC regulations granting preferential treatment for certain minority-owed broadcast stations). The scarcity of broadcast frequencies has supported the Court's willingness to allow regulations of broadcast media that would not be permitted for other forms of communication. *See Red Lion*, 395 U.S. at 388. On regulation of the broadcast medium, see generally HUGH CARTER DONAHUE, THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT? (1989); LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

[122] *Cf.* Aleinikoff, *supra* note 37, 1090 n.143:

> Arguably, it would be possible to construct a program dedicated to increasing diversity that does not draw an explicit race line. The FCC might, for example, review the content of broadcasters' proposed programming. But such a policy would create difficult evaluation, monitoring, and enforcement problems and, as Justice Brennan notes in *Metro Broadcasting*, would raise serious First Amendment issues as well.

(citation omitted).

[123] *See Metro Broadcasting*, 497 U.S. at 616 (O'Connor, J., dissenting) (recognizing the Court's precedents which allow the FCC to seek to diversify the number of competing licensees and to encourage the presentation of various views); Smolla, *supra* note 22, at 959–60 (suggesting that a university might deliberately attempt to maintain a mix of views on its faculty and that government may, in managing other government forums or dispensing benefits, seek to increase the diversity of ideas presented under its auspices). *But see Metro Broadcasting*, 497 U.S. at 585 (suggesting that attempts to promote broadcast diversity by regulating programming content directly would pose serious First Amendment issues); *id.* at 616–17 (O'Connor, J., dissenting) ("[T]he Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers.").

academics critique the discourse of one another. Every examination and every peer review process is a form of content discrimination that would be constitutionally troublesome in other contexts. The U.S. Supreme Court has accepted some degree of discourse management as consistent with First Amendment values, but it has been equally clear that there are limits to the ability of public institutions to pursue educational visions that entail abridging normally understood First Amendment values.[124]

All this suggests that the university is not quite as cozy with the First Amendment marketplace of ideas as Justice Powell's *Bakke* opinion seemed to suggest. Even if we assume that a university might undertake diversity management and discourse management without trespassing upon constitutional values, both forms of management are, at the least, in tension with traditional First Amendment norms. A realization of this tension should have tempered Justice Powell's readiness to label the university's professed interest in educational diversity a compelling one, based upon a simplistic view of the affinity between academic freedom and First Amendment values. The university's use of race as a way of fostering educational diversity essentially seeks permission to employ a suspect classification for professed ends that it does not precisely seek.[125] The appropriate constitutional conclusion to be drawn under these circumstances might well be that the government's asserted

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[124] In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Court declared that a university's stated institutional mission of providing secular education to its students did not relieve the university of the obligation to adhere to constitutional norms. *Id.* at 268. In that case, the Court invalidated the university's attempt to allow a variety of organizations to use university property but to exclude religious organizations from this use. *See also* University of Pa. v. EEOC, 493 U.S. 182 (1990) (declining to allow a university's claim of academic freedom to insulate it from inquiry as to whether it had engaged in racial or gender discrimination); Healy v. James, 408 U.S. 169, 187–88 (1972) (finding that a university is prohibited from denying official recognition of a student organization simply because it found the organization's views abhorrent); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1963) (finding that students cannot be "confined to the expression of those sentiments that are officially approved").

[125] Compare Justice O'Connor's observations about the race-conscious program at issue in *Metro Broadcasting*:

> The asserted interest [of the FCC] is in advancing the Nation's different "social, political, esthetic, moral, and other ideas and experiences," yet of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under equal protection doctrine. Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation's views calls into question the Government's genuine commitment to its asserted interest.

497 U.S. at 621 (citations omitted).

interest in educational diversity is not really compelling.

D. *Religious Belief and Diversity*

The use of second order proxies such as race to create a lively forum of debate and learning appears suspect enough to fail strict scrutiny. But most universities not only rely on these relatively poorly fashioned proxies, they ignore other proxies for viewpoint and perspective that are at least as reasonable as race.[126] One such proxy is religious belief. The religious affiliations of potential students or faculty are likely to be as significant an indicator of the kinds of intellectual diversity to which they might contribute as are their racial or ethnic backgrounds.[127] Moreover, in some academic contexts—the composition of university faculty, for example—there is cause to believe that religious diversity is as scarce as racial diversity.[128] Yet the diversity movement has been singularly silent with respect to the religious inclusiveness of educational institutions.[129] For example, Professor Carl C. Monk as Executive Vice President of the Association of American Law Schools (AALS) reasserted in 1994 the value of diversity in legal education. "It is not possible in our increasingly diverse society, and in an increasingly global economy, to offer quality legal education without the many cultures of our

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[126] *See* J. Harvie Wilkinson, III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1016 (1995) (complaining that diversity has been artificially narrowed to mean little more than race).

[127] *See* Carrington, *supra* note 19, at 1142; Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996). When one hears that American law schools are "inching their way toward 'looking like America,'" Michael Rooke-Ley, *SALT Speaks Out on Diversity, Inclusion and the Promise of "Affirmative Action"*, SALT EQUALIZER 1 (Summer 1995), one suspects that the reliance on this optical metaphor is not a mere happenstance. It highlights visible traits of difference without showing concern for unseen differences, such as those of religious belief.

[128] *See* Volokh, *supra* note 127, at 2072.

[129] *See, e.g.*, Foster, *supra* note 15, at 109 ("Diversity has been used as a code word for a variety of differences including, but not limited to, race, ethnicity, gender, sexual orientation, physical capacity, ideas, and scholarship."). Occasionally someone notices the absence of religion from the standard lists, but then assures us that we should find no significance in this omission. *See* Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1628 (1990) (noting the absence of mandated diversity requirements for religion, sexual orientation, and disability in the AALS bylaws, but observing that the exclusion of reference to diversity of sexual orientation and that "the omission of religion and disability, should not suggest that nondiscrimination on the basis of sexual orientation or religion or disability is any less important than nondiscrimination based on the other categories listed"). For the AALS diversity requirement, see *supra* note 19.

society being adequately represented in the classroom. The voices of different cultures bring to the classroom important perspectives that differ from those of the white majority."[130] To the end that law schools appropriately represent the full breadth of cultural diversity, Professor Monk suggested that:

> Racial and ethnic diversity of the student body and faculty is essential to quality legal education, but schools also, quite appropriately, consider a variety of other factors—such as state residency, prior work experience, economic disadvantage, evidence of leadership and public service, undergraduate major, and undergraduate institution—in making their admissions decisions.[131]

Professor Duncan Kennedy has similarly articulated a "cultural pluralist" case for affirmative action in law school faculty hiring.[132] He argues that "we should structure the competition of racial and ethnic communities and social classes in markets and bureaucracies, and in the political system, in such a way that no community or class is systematically subordinated."[133] If a law school aims to replicate the wide diversity reflected in American society, whether of cultural memberships generally or of membership within subordinated communities, both these lists are most noticeable for their lack of reference to religious diversity and religious subordination.[134] This omission appears to track a broader lack of interest in including religious voices within the spectrum of

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[130] Carl C. Monk, *Reaffirming the Need for Diversity at Law Schools*, 138 NEW JERSEY L.J. 14 (1994).

[131] *Id.*

[132] D. Kennedy, *supra* note 18, at 705.

[133] *Id.* at 712. *See also* Brest & Oshige, *supra* note 15, at 872 (suggesting that institutions concerned with enhancing the educational benefits of diversity "might seek students with diverse cultural backgrounds, or work, travel, and public service experiences"); Foster, *supra* note 15, at 108–09 (describing a diversity "movement" on university campuses in which "diversity" is a "code word" for differences including "race, ethnicity, gender, sexual orientation, physical capacity, ideas, and scholarship"). For a treatment of cultural diversity which does not omit the religious dimension, see JILL NORGREN & SERENA NANDA, AMERICAN CULTURAL PLURALISM AND LAW 97–171 (2d ed. 1996).

[134] Consider, for example, whether members of particular religious groups might be "salient" in the sense used by Brest and Oshige:

> In deciding whom to include in an affirmative action program, a law school might appropriately consider the *salience* of the group in contemporary America or in the geographic region in which its graduates tend to practice. Among the determinants of a group's salience are its numerical size and the extent to which its culture differs from the dominant culture of students attending the school.

Brest & Oshige, *supra* note 15, at 873 (emphasis in original).

diversity now frequently advocated for academia generally.[135]

This variant treatment of race and religion can hardly be justified as constitutionally compelled. Both religion and race are suspect classifications.[136] If the interest in diversity of viewpoint and perspective is sufficient to allow race-conscious admissions and hiring decisions it is sufficient to allow religion-conscious decisions that serve the same purpose.[137] As long as the purpose and effect of a religion-conscious diversity program is not to prefer a particular religion over another or to generally prefer religion over non religion, the Establishment Clause should not pose any barrier to religion-consciousness not

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[135] *See* Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2062 n.7 (1992) (book review) ("[A]lmost none of the contemporary demands for greater diversity of voices within the academy include a call for a greater presence of the almost totally absent sound of a strong religious sensibility."). *See also* Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 996 (1993):

> I also know that my life in the elite legal academy has been basically devoid of contact committed Christians, especially evangelical Protestants. One can count literally on the fingers of one hand the number of publicly visible Protestant evangelicals who hold tenured positions at America's "leading" law schools. In this respect (and, undoubtedly, many others), no elite law school even remotely "looks like America," at least if that is meant to suggest that members of various sub-cultures of American society should actively participate in each of the institutional structures that comprise that society.

Professor Gary Peller has suggested a link between the legal movements which displaced segregation and state-sponsored prayer in public schools. "The logic of the joint rejection of school segregation and school prayer," he writes, "was contained in the sense that each reform reflected a progressive move from ignorance and parochialism to enlightenment and equality, from the particular and biased to the universal and objective." Peller, *supra* note 24, at 780–81. The current movement in favor of diversity challenges—at least from the perspective of race—the ideas of universality and objectivity. The diversity movement denies the existence of a neutral perspective from which to observe in detachment competing racial factions and seeks instead to guarantee a voice for each particularism. But the diversity movement, while championing the cause of racial particularism, seems happy to accept the continued displacement of religious particularity from public institutions. This is especially troublesome in view of the longstanding awareness of the reality of discrimination against both racial *and* religious minorities. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938).

[136] *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (including as examples of suspect classifications race, religion, and alienage). For a general comparison of the constitutional treatment of race and religion, see Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994).

[137] *See* Volokh, *supra* note 127, at 2070–76.

already posed by the Equal Protection Clause.[138] In fact, any deliberate attempt to exclude religious voices from a public space when other viewpoints and perspectives are admitted would clearly violate the free speech guarantee.[139]

What construction should be placed, then, upon academic commitment to the use of race as a proxy for viewpoint and perspectives in academic communities and virtual silence concerning comparable use of religion as a proxy? A possible response might be that the use of race is intended to include within academic institutions perspectives generally subordinated within the broader society, and that religious viewpoints are not generally subordinated in the same way. This response is essentially the same as the response given to the occasional grumbling that if law schools really wanted to be diverse they should hire more conservative republicans.[140] Consider the following fictional account of a discussion concerning law school hiring:

> When Harold finished, Jessica said, "What about our need for affirmative action?"
>
> "Sure," replied Harold, "I can see we need more conservative republicans on this faculty; that view is underrepresented here." Jessica wasn't sure what to do. She could see this would be a losing battle. Should she try to explain to Harold that under-representation of women and minorities on law faculties was not the same thing as not having a republican majority on the faculty? Would Harold be able to see that the republican view-point was easily accessible to students everywhere in American culture—in the news, on the radio? The mainstream culture was in no danger of being underrepresented. It was the viewpoint of those outside of that culture that was in danger of being unheard.[141]

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[138] *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (stating that the establishment clause prohibits laws which "aid one religion, aid all religions, or prefer one religion over another").

[139] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (invalidating a University of Virginia policy which allowed payment from the Student Activities Fund for printing costs of various student publications, but declined to make such payments for printing costs of a religiously oriented student publication); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (invalidating a school district's policy which allowed various groups to use school facilities but prohibited such use for religious purposes); Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating university's exclusion of religious groups from using university facilities made available to a variety of other groups).

[140] *See* Paulsen, *supra* note 32, at 1001.

[141] Wildman, *supra* note 129, at 1634–35. There are other possible objections to this lament. To those for whom "diversity" in higher education is not so much about assembling a diverse range of perspectives as it is about "weakening the white male hegemony in

Perhaps, like those of conservative republicans, the views of religious believers are part of the mainstream culture and "easily accessible." There are two problems with this argument. First, it portrays a shocking failure to appreciate the diversity among religious believers—a classic example of being unable to distinguish between the members of groups other than one's own. One does not expect to hear this clumsy failure to appreciate difference from advocates of diversity. The views of *some* religious believers are well represented within *some* institutions of public life; the views of other religious believers are represented in virtually no institutions of public life. Second, the pure diversity argument in the educational context champions the value of the interaction of ideas within the academic community. It does no good to say that views are accessible to students outside the academic institution. The question is whether those views are being brought to bear upon the subject matter of the academic enterprise. Here, conservative republicanism distinguishes itself from religious belief. Conservative republicanism tends to find expression in most robust exchanges of ideas. Religious perspectives, however, rarely do find expression in the robust exchange of ideas.

To the extent that universities really do rely on race as a proxy to increase the diversity of viewpoints and perspectives, another possible explanation is that this use of race-consciousness yields viewpoints and perspectives with which the modern university is generally comfortable, or at least on speaking terms. A comparable use of religion as a proxy for obtaining diversity would, I suspect, cause universities to admit deliberately viewpoints not well favored within most academic settings. Of course, public universities cannot purposefully exclude such viewpoints without running afoul of both the First Amendment's strong bias against content discrimination of speech and the Free Exercise Clause's comparable ban against official action which targets particular religious beliefs for unfavorable treatment. Consequently, unwelcome viewpoints—those of evangelical Protestants, perhaps, or Mormons or conservative Catholics—will inevitably penetrate the academic citadel. But these viewpoints need not be consciously sought after, such as would be the case if religion were used as a proxy for creating real intellectual diversity among the student body and the faculty of academic institutions. By this reasoning, the use of race but not religion as a proxy hides a covert viewpoint discrimination that hardly justifies denomination as furthering a compelling government interest.

Another face to be put on this discordant treatment of race and religion is that diversity of viewpoint and perspective among students and faculty is not really the educational priority that it is sometimes credited with being and that it

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universities," the attribute of white maleness may override any other feature of difference. *See* Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033, 1038 (1990).

is certainly not a compelling interest.[142] I do not mean that universities do not care about diversity, only that the diversity they care about is somewhat removed from the raucous marketplace of ideas championed by the First Amendment. Academic institutions make no pretensions of being the equivalent of open-air parks where street preachers and political radicals shout at one another. There are any number of reasons why universities believe racial diversity and racial inclusiveness is important. Unfortunately, most of these reasons have either been rejected by the United States Supreme Court as inappropriate bases for race-conscious decisionmaking[143] or are for one reason or another less attractive grounds for using race in admissions and hiring processes.

In response to this reasoning, one might argue that other personal characteristics which contribute to a diverse academic environment will typically find representation within a student body or faculty, and that race alone must be made the subject of more diligent efforts of diversification.[144]

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[142] Professor Volokh suggests that:

> [E]xcluding religion as a factor but including race . . . might also suggest, as underinclusiveness often does, that the actual purpose of the program isn't really the stated purpose; here the real purpose isn't actual diversity of experiences, outlooks, and ideas as such, but rather something else—perhaps just racial or ethnic diversity, a justification that Powell's *Bakke* opinion specifically condemned.

Volokh, *supra* note 127, at 2075–76 (footnote omitted).

[143] *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 505–06 (1989) ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences . . . would be contrary to both the letter and spirit of a constitutional provision whose central command is equality."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 310 (1978) ("[T]he purpose of helping certain groups [who are] perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the program . . . are thought to have suffered.").

[144] For comments on achieving diversity in a law school setting, consider:

> Of course, race and ethnicity are by no means the only aspects of difference that law students should encounter. However, the luck of the draw, supplemented by a general policy of seeking students with different backgrounds and life experiences, will achieve diversity in almost every important respect except race and ethnicity.

Brest & Oshige, *supra* note 15, at 863 n.26. I have not omitted any citation for this assertion because none was made. For a similar defense of attempts to focus diversity efforts on women and racial minorities, Shane asserts:

Although this argument might be legitimate in some academic contexts, the argument seems flatly implausible in other contexts. For example, undergraduate admissions may embrace a wide variety of religious beliefs, but faculty composition does not. Consequently, the blanket use of race, but not religion, as a diversity proxy in both of these settings demonstrates, at the least, a failure or narrow focus that cannot be reconciled with normal applications of strict scrutiny. We should, in fact, turn more directly to this issue of narrow tailoring because it compounds the constitutional difficulties surrounding race-conscious admissions and hiring programs.

E. *Diversity and the Narrow Tailoring Requirement*

Justice Powell's *Bakke* opinion determined that the use of racial quotas in an admissions process was not a narrowly tailored means of attaining the state's interest in diversity but that the consideration of race as one among many factors in the process was a narrowly tailored means of attaining diversity.[145] According to Justice Powell, the reservation of a particular number of seats for minority applicants actually hindered the attainment of the "genuine diversity" of viewpoints in which the state had a compelling interest.[146] Justice Powell justified his sanction of the use of race as a "plus" factor by arguing that, unlike an actual racial quota, no facial intent to discriminate on the basis of race was present "where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."[147] Moreover, he added:

> [A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted

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> To give priority to the need for racial or sexual diversification does not make one insincere in advocating the impact of diversity generally on the institution's sense of what counts as knowledge or scholarly activity. It is not hypocritical to treat diversity as a general good and also to assign higher value to the recruitment of more faculty of color than to the recruitment, say, of sociobiologists.

Shane, *supra* note 141, at 1038.

[145] 438 U.S. 265, 316–19 (1978).

[146] *Id.* at 315.

[147] *Id.* at 317–18. This distinction has been characterized by some commentators as pure sophism. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 476–77, 484 (1994); Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1875 (1995).

by our cases.[148]

In the first place, Justice Powell's attempt to distinguish between a racial quota and the use of race as a "plus" factor is simply untenable. A state policy authorizing the consideration of race as a "plus" factor in an admissions process is certainly a facial classification on the basis of race. The characterization that the use of race as a "plus" factor is facially discriminatory is not altered simply because this discrimination takes place in connection with other classifying devices. Moreover, reliance on race as a classification device by state officials would constitute racially discriminatory administration even without the existence of an official policy.[149]

In the second place, Justice Powell's presumption of good faith on behalf of government officials runs contrary to an oft-cited purpose of strict scrutiny: to "smoke out" illegitimate racial classifications.[150] Justice Powell's generous presumption is reminiscent of the deference to military authorities that

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[148] *Bakke*, 438 U.S. at 318 (citations omitted).

[149] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding the discriminatory administration of the local zoning ordinance unconstitutional).

[150] In *City of Richmond v. J. A. Croson Co.*, the Court held that:

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

488 U.S. 469, 493 (1989). *See also Adarand*, 515 U.S. at 227 ("The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making.").

Some observers have been outright skeptical of the suggestion that universities will simply consider race as one among several factors likely to enhance diversity among their student bodies. Justice Scalia, for example, expressed his skepticism that any race or sex consideration is used only as a plus factor when he described *Bakke* as:

> [T]he requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative-action field . . . [such as *Bakke*] which demanded belief that the University of California took race into account as merely one of the many diversities to which it felt it was educationally important to expose its medical students in the face of a plan obviously designed to force promoting [students] to prefer candidates from the favored racial and sexual classes.

Johnson v. Transportation Agency, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting).

buttressed the Court's egregious reasoning in *Korematsu v. United States*,[151] but wholly inconsistent with modern notions of strict scrutiny. Rigorous review of racial classifications assures that the classifications are not motivated by "illegitimate notions of racial inferiority or simply racial politics."[152] For this reason, the connection between the state's compelling interest and the means chosen to achieve those ends must be close.[153] Yet, it is this precision in the connection between racial classifications and educational diversity that is starkly absent from Justice Powell's blessing on the use of race as a factor in the admissions process. So long as this process was not operated "as a cover for the functional equivalent of a quota system,"[154] Justice Powell was prepared to call it a judicial day insofar as "rigorous" review of a suspect classification was concerned. Moreover, he was willing to leave unresolved crucial questions about the use of race as a "factor" in the admissions process.[155] What weight, for example, may officials give to the characteristic of race, and how should it be compared with other personal characteristics? Is the presence of a diverse group of students actually a compelling governmental interest in all the various departments of the modern university?[156] These questions find no answer in Justice Powell's opinion because he employed a variant of strict scrutiny curiously unconcerned with such specifics.[157] In fact, the scrutiny he employed

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[151] 323 U.S. 214 (1944) (upholding the military order which excluded Japanese Americans from the west coast during World War II).

[152] *Croson*, 488 U.S. at 493; *see also* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 617 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[153] *See* Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

[154] *Bakke*, 438 U.S. at 318.

[155] Justice Blackmun observed candidly that one could achieve the same results by using race as a "plus" factor as by using a racial quota: "the cynical . . . may say that under a program such as Harvard's [using race as a plus factor] one may accomplish covertly what Davis [using racial quotas] concedes it does openly." *Id.* at 406. On the conclusory linkage between race and diversity in Justice Powell's *Bakke* opinion, see David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservativism or Conservative Justices?*, 91 COLUM. L. REV. 790, 838 (1991).

[156] Sanford Levinson suggests that diversity might have less benefit in some departments than others. *See* Levinson, *supra* note 25, at 116. Although Justice Powell denied that the university in *Bakke* had made the kind of findings necessary to use race as a proxy for accomplishing the state's interest in remedying prior racial discrimination, he simply assumed that race was an appropriate proxy for achieving educational diversity. *See* Chang, *supra* note 155, at 838 n.163.

[157] *See* Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's* Bakke, 49 WASH. & LEE L. REV. 53, 62 (1992).

is not "strict" in any recognizable form.

I do not mean, though, to suggest that Justice Powell's pale version of strict scrutiny is somehow unique. More recent defenders of the diversity rationale admit more candidly that the application of this rationale in practice involves seemingly "arbitrary" distinctions.[158] Paul Brest and Miranda Oshige, for example, attempt to address the issue of which groups should be made the beneficiaries of affirmative action programs in law school admissions and in hiring contexts. They acknowledge frankly that "[a]ny diversity or affirmative action policy is likely to reflect the local history of a particular institution and is bound to be somewhat arbitrary with respect to the groups it includes."[159] They attempt to analyze which groups should be the beneficiaries of affirmative action programs but ultimately admit that "the data marshaled . . . can do little beyond informing one's intuitions on some very fundamental questions" and that "[a]s is often true with respect to matters of law and policy, the allocation of the burden of proof makes all the difference."[160] If the burden of proof does in fact make all the difference, then, as far as the application of strict scrutiny is concerned, the matter is settled. Once a claimant demonstrates facts justifying the application of strict scrutiny, the government has the burden of proving both the presence of a compelling governmental interest and that the means chosen to achieve this interest are narrowly tailored.[161]

The diversity rationale, once exposed to the "smoking out" function of strict scrutiny, should not survive constitutional challenge because it creates a zone of discretion within which unconstitutional motivations can conceal themselves. For example, no one who reads law review articles can be unaware of the widespread dissatisfaction with the Court's determination that the

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[158] *See* EDLEY, *supra* note 4, at 140 (discussing the need for organizations to consider the expected benefits and costs of diversity programs, but noting that "in practice, we haven't a clue how to measure these benefits and costs directly"); Note, *supra* note 81, at 1362 (noting that the benefits of educational diversity "cannot be quantified or verified by scientific proof"). For an attempt to study the various institutional factors that influence university learning, including an institution's commitment to educational diversity, see generally ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE?: FOUR CRITICAL YEARS REVISITED (1993).

[159] Brest & Oshige, *supra* note 15, at 856.

[160] *Id.* at 899.

[161] *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 227 (1984) ("To satisfy strict scrutiny the state must show . . . a compelling state interest by the least restrictive means practically available."). *See also* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 505 (1989) (referring to the *city's* failure to demonstrate a compelling governmental interest justifying an affirmative action program). *See generally* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 589-92 (1995) (discussing the burden of proof under strict scrutiny).

remedying of generalized social discrimination against minorities is not a sufficiently compelling interest to justify race-conscious policies[162]. The diversity rationale offers a fine cloak for pursuing these policies.[163] In addition, the diversity rationale offers a convenient means of sidestepping the Supreme Court's hostility to generalized attempts to remedy what it has termed "societal discrimination," as opposed to specifically identified instances of discrimination by an official actor. Decisionmakers frustrated by this hostility can, without significant intellectual contortion, easily cloak their enthusiasm for overcoming past and present social discrimination against particular minorities under a commitment to "diversity."[164] Justice Powell's *Bakke* opinion restrained the use

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[162] *See, e.g.*, Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 821 (1995) (disapproving of the Supreme Court's position on "societal discrimination"); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (emphasizing the continued relevance of societal discrimination as a justification for affirmative action policies); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE L. 51, 63 (1996) (objecting to the Supreme Court's rejection of societal discrimination as a basis for remedial action).

[163] *See* PAUL E. PETERSON, *A Politically Correct Solution to Racial Classification*, *in* CLASSIFYING BY RACE 7 (Paul E. Peterson ed., 1995) ("Powell came very close to giving constitutional sanction to public hypocrisy as policy."). The asserted "fraud" of race-conscious admissions programs has been a regular refrain of Professor Lino Graglia. *See* Lino A. Graglia, Hopwood*: A Plea to End the "Affirmative Action" Fraud*, 2 TEX. F. CIV. LIB. & CIV. RTS. 105 (1996); Lino A. Graglia, Podberesky, Hopwood, *and* Adarand*: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 289 (1996) (describing Justice Powell's formulation in *Bakke* as "little more than an invitation to fraud"); Lino A. Graglia, Hopwood v. Texas*: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 87 (1995) ("If universities are free to discriminate at all to admit members of preferred groups, they will, as a practical matter, be able to discriminate to whatever extent is necessary to admit the desired numbers.").

[164] *See* Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979):

> I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of countering the effects of societal discrimination . . . comes closer to stating their central purpose . . . .

See also Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 930 (1996) ("For those who support affirmative action but cannot convince themselves that it is primarily justified by anything other than remedying past discrimination or distributive justice, the diversity fig leaf exists as a pretext."); Shane, *supra* note 141, at 1037 (suggesting that universities took *Bakke*'s lesson to be "the importance of not appearing to be too conspicuously interested in particular numbers of minority students on

of rigid quotas for racial minorities, but scarcely disturbed at all the ability of those who favor a generous policy toward "benign" discrimination on behalf of racial minorities from accomplishing their aims.[165]

Justice Powell also failed to consider whether the state's interest in achieving educational diversity could be obtained without considering race as a "plus" factor in the admissions process.[166] Estimations of the likely consequences of abolishing racial preferences in admissions tend to be stated in stark terms:

> Absent a radical redesign of admissions criteria, an end to affirmative action would leave many of the nation's law schools—especially the most selective ones—with a largely white and (increasingly) East Asian student body, and with few African American, Latino, and Native American students. Both for educational and for broader social reasons, such a result strikes us as highly undesirable—catastrophic would not be too strong a word.[167]

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campus. 'Diversity' . . . became the code word for . . . increasing representation within faculties and student bodies of women and of people of color, and making university environments and curricula more cognizant of and responsive to the experiences of often marginalized groups").

[165] *See* Chen, *supra* note 20, at 1847 (stating that scholars in favor of affirmative action policies "exhibit a remarkable faith in the ability of politicians, bureaucrats, and educators to act 'benignly'").

[166] California's public colleges and universities, for example, barred by the University Regents from considering race as a factor in admissions, have decided to focus instead on social disadvantage as an important factor in the admissions process. It is not clear, though, whether frustrated advocates of affirmative action programs will be able to craft race-neutral policies with an intent to benefit certain racial minorities. In *Adarand*, the majority noted parenthetically that the case before it "concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995). Proponents of race-conscious admissions programs also contend that the use of social disadvantage rather than race as a "plus" factor would not assure that educational institutions would be racially diverse. *See* Brest & Oshige, *supra* note 15, at 897–98. In any event, it is not clear how a socially disadvantaged status could be substituted for race in faculty hiring decisions.

[167] Brest & Oshige, *supra* note 15, at 858. *See also* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986) (suggesting that access for African American students to universities would be "drastically narrowed" in the absence of affirmative action programs). For a more general argument that the use of race neutral classifications seldom achieve the goal of alleviating racial subordination, see Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 177–82 (1994). *But see* Richard A. Posner, *The* DeFunis *Case and the Constitutionality of*

This appraisal, and others like it,[168] tend to emphasize the lack of *racial* diversity that will exist in universities if they are stripped of the ability to consider race as a positive factor in the admissions process. But the proper constitutional inquiry, suggested by Justice Powell's focus on the compelling governmental interest in educational diversity, is whether a diversity of outlooks and perspectives *requires* race-conscious decisionmaking. Furthermore, the inquiry should attend to whether other non race-conscious admissions and hiring criteria might produce the educational diversity desired.[169] For example, the texts chosen to be studied in an academic setting may well contribute as much or more to intellectual diversity as the identities of the faculty and students.[170]

Preferential Treatment of Racial Minorities, 1974 SUP. CT. REV. 1, 32 (arguing that redefining preferences in terms of the underprivileged rather than in racial or ethnic terms would not greatly impair the impact on the intended class of beneficiaries).

The diversity rationale may actually impose a ceiling on the achievement of racial minorities by justifying rejection of minority candidates whose applications exceed their proportional numbers in the relevant population.

> [B]ecause the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion). For the suggestion that race-conscious admissions programs have perpetuated a kind of "groupthink" which actually undermines real diversity on university campuses, see Nat Hentoff, *The Truth About Those "Diverse" Campuses*, WASH. POST, Apr. 27, 1996, at A23.

[168] *See, e.g.*, Kevin Brown, Hopwood*: Was This the African-American Nightmare or the African-American Dream?*, 2 TEX. F. CIV. LIB. & CIV. RTS. 97 (1996).

[169] *See* Volokh, *supra* note 127, at 2068 (suggesting that differences other than race already make educational institutions intellectually diverse). See, for example, Roy Brooks's proposal of "whole person" admissions policies, which—as between roughly comparable students—prefers those who have demonstrated greater self-determination and character. ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 236–37 (1996). Brooks also suggests using a race-neutral admissions preference for students who are willing to work after graduation in socioeconomically depressed areas. *See id.* at 237–39.

[170] Carrington suggests that:

> Nearly all of us who have not had it will learn more (right or wrong) about the experience of being female from one novel by Jane Austen than by forty-two hours of legal instruction from a female law professor. Surely more can be learned about the black experience from reading autobiographical works of Malcolm X, Claude Brown, James Baldwin, and others, than from hundreds of hours of discourse about law.

Carrington, *supra* note 19, at 1147.

The diversity rationale for race-conscious admissions and hiring decisions suffers the same defect as the role model argument sometimes used to justify affirmative action policies: it is simply too amorphous a goal to shelter use of a suspect classification.[171] Moreover, the diversity rationale violates one of the most often repeated canons of the Supreme Court's affirmative action cases: that race-conscious remedies must have some temporal ending point.[172] Like the use of race as a basis for providing role models to minority students in educational contexts, the diversity rationale allows educational officials to engage in racial discrimination "long past the point required by any legitimate remedial purpose."[173] The Supreme Court has suggested in the broadcast context that diversity programs are not temporally open-ended.[174] However persuasive this confident declaration might seem in the case of broadcasting, it is not immediately apparent why it should apply to the educational context. Simply to be able to describe the circumstances under which race-conscious programs would no longer be necessary to achieve educational diversity should hardly count as temporally bounded.

Finally, the diversity rationale may in fact undermine the real quest for intellectual diversity. Consider Professor Ruth Colker's lament that mechanical applications of the diversity rationale have resulted in diminished attention to the content of her ideas:

> I have often been the beneficiary of the "diversity" rationale but grow

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[171] *See Wygant*, 476 U.S. at 276 (plurality opinion) (finding that the state's asserted interest in providing role models for minority children was too indefinite a basis for employing a racial classification). The dissenters in *Metro Broadcasting* rejected diversity as "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[172] *See Wygant*, 476 U.S. at 276 (plurality opinion) (criticizing racial preferences based on generalized societal discrimination as allowing remedies that are "ageless in their reach into the past, and timeless in their ability to affect the future"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (describing societal discrimination as "an amorphous concept of injury that may be ageless in its reach into the past"). It is perhaps at this point, as much as any other, that the Court has departed from the views expressed by many legal academics who favor the use of race-conscious decisionmaking as a future-oriented tool for creating a more inclusive society. *See, e.g.*, Sullivan, *supra* note 26, at 98 (arguing that "the benefits of building a racially integrated society for the future can be justification enough" for affirmative action policies).

[173] *Wygant*, 476 U.S. at 275 (plurality opinion).

[174] *See Metro Broadcasting*, 497 U.S. at 596 ("Such a goal carries its own natural limit.... The FCC's plan, like the Harvard admissions program discussed in *Bakke*, contains the seed of its own termination.").

> tired of its mechanical application to my situation. Each time that I have been hired at an academic institution, I am surprised to find out how few members of the faculty bothered to acquaint themselves with the *quality* or *substance* of my scholarship. It is easier to say that I diversify the faculty because of my gender or sexual orientation rather than to ask the more probing question of whether my gender or sexual orientation have affected my scholarship in ways that are original and thought-provoking. By contrast, when I have observed the hiring deliberations for white men, I have seen close attention paid to the quality of their work.[175]

Professor Jerome Culp, though supportive of race-conscious admissions programs, laments the current use of race as a diversifying factor in universities:

> In fact, educational affirmative action plans often take from the pool of minorities those applicants with the smallest intersection of race and poverty because such choices require the least investment in seeking out and preparing people to be students in these institutions. We could find students from among those with more diverse backgrounds to admit to our schools, but ultimately we choose not to because this brand of race consciousness is financially and ideologically expensive. We prefer the mildly race-conscious policy because it is cheaper and likely to change us the least.[176]

Other commentators have suggested that the use of race as a proxy for diversity tends to benefit upper-class minorities[177] or particular racial and ethnic minorities over other such minorities.[178] The clumsiness of relying on the proxy of race or gender in contexts in which more immediate attention to ideas is possible suggests again that the modern academy is not actually interested in the "robust exchange of ideas" when it uses race and gender in this way, but is simply interested in racial or gender diversity.

V. CONCLUSION

This Article has pursued a quite narrow aim. I have not attempted to investigate in a general way the constitutionality of race-conscious admissions and hiring programs in educational institutions. There are many possible

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[175] COLKER, *supra* note 87, at 140.

[176] Culp, *supra* note 166, at 178.

[177] *See, e.g.*, Wilkinson, *supra* note 126, at 1014. For a discussion of diversity in terms of social and economic class, see Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1886–87 (1996).

[178] *See* Chin, *supra* note 163, at 895–901.

justifications for such programs and this Article has not endeavored to evaluate all or even most of them. Instead, I have concentrated on one possible justification, which I have referred to as a "pure" diversity rationale for race-conscious policies. This rationale I take to be a defense of race-consciousness simply in terms of its asserted merit as a necessary means of producing a diversity of viewpoints and perspectives in academic contexts. Of course, the diversity rationale for race-consciousness need not be untethered from other considerations. One might supplement this rationale with concern for redressing past practices of racial discrimination, of distributing important social benefits in an egalitarian manner, or of using educational institutions as tools to displace a perceived caste system in which race is alleged to play a crucial part.[179] Some of these supplemental rationales are themselves constitutionally troublesome according to the Supreme Court's current precedents and probably would not rescue a diversity policy if the "pure" diversity rationale itself were found to be constitutionally inadequate. I have not attempted, though, to enter this more tangled thicket.

Instead, I have attempted to return to the pure diversity argument articulated in Justice Powell's *Bakke* opinion. It is my sense that the reign of this opinion has allowed scholars and institutions to avoid addressing the very questions suggested, but not answered, by the previous paragraph. Only by laying bare the poverty of the pure diversity argument will courts and commentators be in a position to see whether a more nuanced justification for race-conscious admission and hiring policies might survive constitutional scrutiny. As for the sufficiency of the pure diversity argument, I have concluded that it cannot withstand the rigorous scrutiny now applied to all race-conscious policies. Without supplementing this rationale with some remedial or anti-caste principle, for example, it is not possible to explain the academy's use of race as a diversity proxy rather than other equally plausible or even more plausible proxies for intellectual viewpoints and perspectives.[180] To proceed

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[179] So supplemented, the diversity rationale might continue to support the use of race as a "plus" factor in admissions in a way comparable to the Supreme Court's continued willingness to allow some measure of race-consciousness in voter districting. For a comparison of *Bakke* and the Court's voter districting cases, see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588 (1993).

[180] It is possible, for example, that an anti-caste principle such as Cass Sunstein has articulated might provide a basis for distinguishing between religion and race as potential proxies for admissions and hiring decisions in academic institutions. Perhaps race, more than religion, has been the basis of systemic disadvantages in this society that public institutions ought to seek to reverse. A systemic disadvantage, Sunstein suggests, is one "that operates along standard and predictable lines, in multiple important spheres of life, and that applies in realms like education, freedom from private and public violence, wealth, political

with race-conscious policies under these circumstances is to admit into the academy the unmistakable air of subterfuge.

representation, and political influence, all of which go to basic participation as a citizen in a democratic society." Sunstein, *supra* note 84, at 770 (footnote omitted).